

No. 93-1504-CFX
Status: GRANTED

Title: Celotex Corporation, Petitioner
v.
Bennie Edwards, et ux.

Docketed:
March 22, 1994

Court: United States Court of Appeals for
the Fifth Circuit

Vide:

Counsel for petitioner: Warren, Jeffrey W.

Counsel for respondent: Rosenthal, Brent

Ptn due & mld 3-22-94, see ml label re dkt dt.

Entry	Date	Note	Proceedings and Orders
1	Mar 22 1994	G	Petition for writ of certiorari filed.
2	Apr 25 1994		Brief of respondents Bennie Edwards, et ux. in opposition filed. VIDED.
3	May 4 1994		DISTRIBUTED. May 20, 1994 (Page 1)
4	May 23 1994		Petition GRANTED. limited to the following question: "Whether Rule 65.1 of the Federal Rules of Civil Procedure allows enforcement of a supersedeas bond, posted to stay execution of judgment against a defendant that filed for reorganization after the judgment became final, against the non-bankrupt surety that issued the bond, even though a bankruptcy court in another circuit has attempted to restrain executed on supersedeas bonds posted in favor of the debtor under section 105(a) of the Bankruptcy Code. *****
5	Jun 7 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the Fifth Circuit.
10	Jun 13 1994		Record filed.
		*	Original proceedings United States District Court for Northern District of Texas. (BOX)
6	Jul 7 1994		Brief amicus curiae of Aetna Casualty and Surety Company filed.
7	Jul 7 1994		Joint appendix filed.
8	Jul 7 1994		Brief of petitioner Celotex Corporation filed.
9	Jul 7 1994		Brief amicus curiae of Northbrook Property and Casualty Insurance Company filed.
12	Jul 15 1994		Order extending time to file brief of respondent on the merits until August 24, 1994.
13	Aug 24 1994		Brief of respondents Bennie Edwards, et ux. filed.
14	Aug 24 1994		Brief amicus curiae of Association of Trial Lawyers of America filed.
15	Aug 24 1994		Brief amicus curiae of New York Clearing House Association filed.
16	Sep 26 1994		Reply brief of petitioner filed.
17	Sep 30 1994		CIRCULATED.
18	Oct 7 1994		SET FOR ARGUMENT TUESDAY, DECEMBER 6, 1994. (2ND CASE).
19	Dec 6 1994		ARGUED.

①

Supreme Court, U.S.
FILED

931504 MAR 22 1994

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In The
Supreme Court of the United States
October Term, 1993

THE CELOTEX CORPORATION,

Petitioner,

v.

BENNIE EDWARDS and JOANN EDWARDS,

Respondents.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Will the Court, in its certiorari discretion, review *Edwards v. Armstrong World Industries, Inc., et al.*, 6 F.3d 312 (5th Cir. 1993), which affirmed the district court's (Northern District of Texas) May 27, 1992 order?

Stated otherwise, at the present time, are there special and important reasons for the Court to exercise its certiorari jurisdiction, because:

1) the Fifth Circuit has rendered a decision in direct conflict with the decision of the Fourth Circuit on the same matter in *Willis v. The Celotex Corporation*, 978 F.2d 146 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 1846 (1993); and,

2) the Fifth Circuit has demonstrated an apparent departure from the accepted and usual course of judicial proceedings in affirming the Northern District of Texas district court's May 27, 1992 order, which order collaterally attacks an order entered by the United States Bankruptcy Court for the Middle District of Florida.

LIST OF PARTIES

The parties to the proceedings below are identified in the caption of the case. The Celotex Corporation ("Celotex") is wholly-owned by Jim Walter Corporation and, Celotex has a wholly-owned subsidiary, Carey Canada Inc. Although not formally named as a party in the proceedings below, Northbrook Property and Casualty Insurance Company ("Northbrook") has an interest in the outcome of this petition because Northbrook is the surety on the supersedeas bond posted by Celotex which is at issue and is the surety on like bonds in similar cases.

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OPINIONS BELOW

Edwards v. Armstrong World Industries, 6 F.3d 312 (5th Cir. 1993), App. 1: the Fifth Circuit's order and opinion affirming the district court's May 27, 1992 order granting execution against a supersedeas bond posted by Celotex, holding that "the [bankruptcy court's] stay is not within the equitable powers of the bankruptcy court." *Id.* at 320. The district court's May 27, 1992 order is unpublished and may be found at App. 23.

Edwards, 6 F.3d at 321, App. 21: the Fifth Circuit's order denying Celotex' petition for rehearing, yet offering "a few explanatory words," stating that "we have not held that the bankruptcy court in Florida was necessarily wrong." *Id.*

JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 1651. The jurisdiction of the district court was properly invoked pursuant to 28 U.S.C. § 1332. On November 5, 1993, the Fifth Circuit entered its order affirming the district court. On December 22, 1993, the Fifth Circuit entered its order denying Celotex' petition for rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The issues presented by this petition generally implicate Articles I and III of the Constitution of the United

States, relating to the constitutional basis for, and the powers of, the bankruptcy courts, and title 11 of the United States Code, including the following specific provisions:

U.S. Const. art. I, § 8, cl. 4: The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.

U.S. Const. art. III, § 1: The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

11 U.S.C. § 105(a): The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

28 U.S.C. § 157(a): Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district. . . .

28 U.S.C. § 158(a): The district courts . . . shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy

judges under section 157 of this title [28 U.S.C. § 157]. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

28 U.S.C. § 158(d): The court of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

65.1 Fed.R.Civ.P.: Whenever these rules, including the supplemental rules for Certain Admiralty and Maritime Claims, require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

STATEMENT OF THE CASE

This case involves a collision between the antithetical litigation philosophies that have fueled the "asbestos mess"¹ and the bankruptcy philosophies that are manifest

¹ The term used by the Judicial Panel on Multidistrict Litigation aptly describing the pending federal district court

in the utilization of a temporary stay as a case management control mechanism by the bankruptcy court charged by Congress to administer the reorganization case of Celotex, a defendant of asbestos-related mass tort claims.

A. Pre-bankruptcy proceedings

On April 17, 1989, the district court entered a \$281,025.80 judgment (including interest) against petitioner, Celotex, and in favor of respondents, Bennie and Joann Edwards (the "Edwards") for asbestos related injuries. *Edwards*, 6 F.3d at 314. This judgment is for \$245,000 in punitive damages, compensatory damages being only \$35,253.80. Judgment, App. 24.

To stay execution pending appeal, Celotex, as principal, and Northbrook, as surety, posted a supersedeas bond in the amount of \$294,987.88. *Edwards*, 6 F.3d at 314. Northbrook acted as surety pursuant to a settlement agreement with Celotex resolving insurance coverage disputes and secured its obligation under the bond with insurance proceeds remaining to be paid to Celotex under the agreement. *Id.*

On September 20, 1990, the Fifth Circuit affirmed the district court's judgment. *Id.* The mandate issued on October 12, 1990. *Id.*

actions involving allegations of personal injury or wrongful death caused by asbestos in its opinion and order in *In re Asbestos Products Liability Litigation* (No. VI), 771 F. Supp. 415, 424 (J.P.M.L. 1991).

B. Proceedings in the bankruptcy court

That same day, October 12, 1990, Celotex and its wholly owned subsidiary, Carey Canada Inc. (the "Debtors"), filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-1129 in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division. On October 17, 1990, to augment the automatic stay protection afforded the Debtors under 11 U.S.C. § 362(a), the bankruptcy court entered a stay under Bankruptcy Code 11 U.S.C. § 105(a), ordering that:

[a]ll persons . . . be and each of them are hereby stayed, restrained and enjoined from:

. . . .

f. Taking any act to collect, assess, or recover a claim against any of the Debtors that arose before the commencement of the Chapter 11 cases . . .

. . . .

3. Notwithstanding any exceptions or limitations to the automatic stay contained in § 362(b) of the Code, all Entities are hereby jointly and severally stayed, restrained and enjoined from commencing or continuing any judicial, administrative or other proceeding involving any of the Debtors regardless of (a) who initiated the proceeding, (b) whether the matter is on appeal and supersedeas bond has been posted by the Debtors or (c) the appellant in an appeal is one of the Debtors.

4. On request of a party in interest, and after not less than thirty (30) days' written notice to the attorneys for the Debtors, and after a hearing, this Court may consider granting

relief from the restraints imposed herein in the event that it be deemed necessary, appropriate and warranted to so terminate, annul, modify or condition. . . .

App. 26.

The § 105(a) stay was entered for the purpose of precluding, among other things, judgment creditors from proceeding in various state and federal courts against supersedeas bonds posted by the Debtors without first coming before the bankruptcy court. *Matter of Celotex Corp.*, 128 B.R. 478 (Bankr. M.D. Fla. 1991). App. 30.

On June 13, 1991, the bankruptcy court entered its Omnibus Order On Motion To Lift Stay With Regard to Celotex Appeals And To Release Supersedeas Bonds Thereon, *Celotex*, 128 B.R. 478. Thereby, the bankruptcy court affirmed the § 105(a) stay, finding that Second, Fourth and Fifth Circuit decisions support the bankruptcy court's authority "to stop ongoing litigation and to prevent peripheral court decisions from dealing with issues, properties, or entities involved in a debtor's reorganization process without first allowing the bankruptcy court to have an opportunity to review the potential effect on the debtor." *Id.* at 484. The bankruptcy court stated:

The federal courts of appeals, upon viewing injunctions granted during pandemic tort-bankruptcy cases such as this have consistently understood these circumstances *and have endorsed the jurisdiction* and utilization of a stay as a case management control mechanism Where bankruptcy courts in "mega" cases such as this are required to deal with complex litigation involving numerous parties, joint and

several liability, and multi-million dollars in claims and assets, not to mention potential conflicts with other judicial determinations, the powers of the bankruptcy court under Section 105 must in the initial stage be absolute, unless limited by the Bankruptcy Code or other federal laws. Clearly, the role of Section 105 in this type of case is first to protect the reorganization process.

Id. at 483-484 (emphasis added).

Addressing the point that has now become the crux of this petition, the bankruptcy court wrote:

As to the utilization of Section 105 vis-a-vis the supersedeas bonds, *once the judgment creditor has been successful throughout the appellate process*, the judgment creditor is not able to proceed against the supersedeas bond without seeking to vacate the Section 105 stay in this Court. Under these circumstances, it will be Debtor's burden to establish that the Section 105 stay should continue. The Court's inquiry will include Debtor's ability to avoid any final judgment under the Bankruptcy Code and the necessity to protect its sureties or disenfranchise them if such surety agreements can be considered executory contracts or avoided under the avoiding powers in the Bankruptcy Code. (11 U.S.C. §§ 365, 547, and 548.) Additionally, consideration will be given to Debtor's ability to deal with the targeted litigation within the reorganization plan and the effect on that process if the Section 105 stay is extinguished. *The analysis may also include the treatment of those judgments which include punitive damages* (footnote described below). . . .

Accordingly, it is

ORDERED . . . that:

. . . .

3. Where at the time of filing the petition, the appellate process between Debtor and the judgment creditor had been concluded, the judgment creditor is precluded from proceeding against any supersedeas bond posted by Debtor without first seeking to vacate the Section 105 stay entered by this Court. . . .

Id. at 484-85 (emphasis added).

The bankruptcy judge dropped a footnote, explaining that:

Section 726(a)(4) of the Bankruptcy Code provides that punitive damages are fourth in line for distribution in a Chapter 7 liquidation. Although Section 726(a)(4) is inapplicable to Chapter 11 reorganizations (citations omitted), it is well-established that bankruptcy courts have inherent equitable power to disallow, limit, or subordinate claims for punitive damages in Chapter 11 reorganizations. (citations omitted).

Id. at 484 n. 12.

On May 28, 1992 the bankruptcy court entered its Order On Motions For Relief From Section 105 Stay, *Matter of Celotex Corp.*, 140 B.R. 912 (Bankr. M.D. Fla. 1992), App. 47, in which the bankruptcy court denied motions to lift the § 105(a) stay to allow judgment creditors to proceed against their respective supersedeas bonds. Again, the court expressly extended the stay to the sureties on such bonds finding:

[d]issolving the Section 105 stay would merely shift the battleground: if the Section 105 stay were lifted to enable the judgment creditors to reach the sureties, the sureties in turn would seek to lift the Section 105 stay to reach Debtor's collateral, with corresponding actions by Debtor to preserve its rights under the settlement agreements. Such a scenario could completely destroy any chance of resolving the prolonged insurance coverage disputes currently being adjudicated in this Court. The settlement of the insurance coverage disputes with all of the Debtor's insurers may well be the linchpin of Debtor's formulation of a feasible plan [footnote omitted]. Absent the confirmation of a feasible plan, Debtor may be liquidated or cease to exist after a carrion feast by the victors in a race to the courthouse.

Id. at 915.

The bankruptcy court noted that "in a non-bankruptcy context, [the judgment creditors] would be entitled to have their judgments satisfied", but found that "any possible harm . . . can be minimized through the establishment of an adequate protection mechanism." *Id.* Accordingly, the bankruptcy court ordered, among other things, that the Debtors provide adequate protection to the supersedeas bond judgment creditors and ordered the Debtors to commence within 60 days, if at all, a preference action, fraudulent transfer action or any other action to avoid or subordinate the judgment creditors' claims, such as the Edwards' punitive damages award. Debtors fully complied with all adequate protection requirements of the bankruptcy court and timely filed an action against the Edwards and similarly situated judgment creditors.

C. The district court's May 27, 1992 Fed.R.Civ.P. 65.1 execution order

Despite Northbrook's and Celotex' objections that the Edwards' Rule 65.1 motion to enforce the supersedeas bond was filed absent modification of the § 105(a) stay, the district court entered its order granting release of the bond. App. 23.

D. The Fifth Circuit affirms the execution order

Stating that "[t]he threshold question in this appeal is whether the district court had jurisdiction to determine the applicability of the bankruptcy court's stay", *Edwards*, 6 F.3d at 315, and then sharpening the issue "to the question of whether prudential (or other) considerations justify extending the bankruptcy court's jurisdiction to the point where it includes the power to stay the proceedings in question here," *Id.* at 319, the Fifth Circuit affirmed the district court's order that "plaintiffs may execute. . . ." *Id.* at 321.

However, in its *rehearing denied* order, the Fifth Circuit offered "[a] few explanatory words." *Id.* at 321. The court rejected Celotex' argument that the Northern District of Texas and the Fifth Circuit are not permitted to collaterally attack the bankruptcy court's order, the court positing two points as its rationale for rejecting its collateral attack problem. First, "the bankruptcy court's order does not purport to reach the proceedings in this case and therefore executing the supersedeas bond does not infringe the Eleventh Circuit's proper jurisdiction." *Id.* Second, the Fifth Circuit stated that its "opinion merely

declares this court's power to protect and preserve supersedeas bonds posted in our district courts. Thus, we have not held that the bankruptcy court in Florida was necessarily wrong; we have only concluded that the district court over which we do have appellate jurisdiction was right." *Id.*

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision departs from SUP.CT.R. 10's accepted and usual course of judicial proceedings because:

1. it directly conflicts with *Willis v. The Celotex Corporation*, 978 F.2d 146 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 1846 (1993); and
2. the Fifth Circuit sanctioned a collateral attack against the bankruptcy court's § 105(a) stay, creating a serious problem for judicial administration.

The Court's power of supervision is particularly implicated because the Fifth Circuit's decision and opinion undermines the orderly process of bankruptcy cases. Appropriate review of orders of bankruptcy judges charged by Congress with the unique business of restructuring debtor-creditor relationships is by direct appeal. This is particularly important in multidistrict massive toxic tort litigation scenarios where the interests of countless asbestos injury claimants seeking a fair share of available assets must be balanced against other asbestos injury claimants who seek preferred payment because

they hold judgments for punitive damages and a supersedeas bond has been posted.

I. The Fifth Circuit's Decision Conflicts With The Fourth Circuit On Identical Facts

In *Willis*, 978 F.2d 146, the Fourth Circuit recognized that § 105(a) permits the bankruptcy court to "issue any order . . . that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. The *Willis* court followed its earlier decision in another bankruptcy case caused by massive toxic tort litigation, *A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994, 1003 (4th Cir.), cert. denied, 479 U.S. 876, 107 S.Ct. 251 (1986). As much as the Article III judiciary and anyone else associated with the dispensation of justice might not relish the prospect of personal injury judgment creditors being stayed by Article I adjunct judges, Congress established the United States Bankruptcy Court to, *inter alia*, resuscitate worthy debtors and, in the process, granted bankruptcy judges the power to temporarily stay creditors in their executions if such is necessary for administration of Chapter 11 estates.

Edwards conflicts with *Willis*. The conflict is most compelling for several reasons. Celotex is the judgment debtor in both cases and has the same counsel. Respondents' counsel are also the personal injury judgment creditor's counsel in *Willis*. Celotex secured its supersedeas bond obligation² in *Willis* with its own assets (certificates

² As a purely technical matter, the supersedeas bond obligor is the principal, in this case, Celotex. See Fed.R.Civ.P.

of deposit, 978 F.2d at 148), just as Celotex secured the *Edwards* bond with its own assets (settlement receivables from the surety that was also one of its liability carriers, *Edwards*, 6 F.3d at 314). These two cases create a deep and intolerable conflict, the *Willis* judgment creditors being relegated to moving to vacate the stay in the bankruptcy court, with appellate rights within the Eleventh Circuit, while the *Edwards* judgment creditors were permitted to collaterally attack the bankruptcy court's order in an Article III forum other than one permitted by law. 28 U.S.C. § 158(a).³

The Fourth Circuit recognized that the Celotex bankruptcy and supersedeas bonds associated with that case are quite different from the "usual bankruptcy" where "third-party payments on a supersedeas bond securing a judgment owned by the bankrupt would not affect reorganization. . . ." *Willis*, 978 F.2d at 149. The court agreed that "immediate execution against sureties on the supersedeas bonds would have been detrimental to Celotex' ability to formulate a plan of reorganization." *Id.* at 149-150.

62(d): "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay. . . ." The appellant, as principal obligor on the bond, may secure or collateralize his bond by depositing money or other property in the court's registry. Usually, the court utilizes state court rules providing that the court's clerk will file the judgment debtor's bond when he provides adequate security, e.g., a surety in good standing. Before accepting the obligation under the supersedeas bond, the surety requires proper collateral from the principal.

³ *Supra*, p.2.

As discussed later in this petition, the only criticism of the Fourth Circuit's opinion is that it was not within the province of Article III courts in the Fourth Circuit to so much as consider whether the bankruptcy judge acted "improperly in enjoining execution on supersedeas bonds." *Id.* at 150. The Article III judiciary reaches that question in only one instance: when, after the judgment creditor is unsuccessful in a motion to lift the § 105(a) stay entered by the bankruptcy court, the creditor appeals to the district court of which the bankruptcy court is an adjunct, thence to the circuit court of appeals that exercises appellate jurisdiction over the district court. *See* 28 U.S.C. § 158(a) and (d).⁴

In any event, the Fourth Circuit correctly vacated the execution order of its district court in Virginia and remanded "for further proceedings at such time as the bankruptcy court lifts the § 105(a) stay." *Willis*, 978 F.2d at 150.

The Fourth Circuit acknowledged the bankruptcy principles that enable a debtor making transfers of assets prior to filing a bankruptcy petition to avoid those transfers stating "[W]e assume that once the bankruptcy court has had an opportunity to evaluate whether any portion of *Willis*' judgment is voidable, it will lift the stay." *Willis* at 978 F.2d at 149 n. 5. The transfer of assets by Celotex to secure the posting of the supersedeas bond for the benefit of the Edwards, and bonds for others similarly situated, has been challenged by Celotex for the benefit of all creditors as avoidable under the Bankruptcy Code.

⁴ *Supra*, pp.2-3.

The bankruptcy court was correct, *Celotex*, 128 B.R. at 484 n. 12, in holding that it has "inherent equitable power to disallow, limit, or subordinate claims for *punitive damages* in Chapter 11 reorganizations." A bankruptcy court sits as a court of equity and can look behind a judgment to determine the essential nature of the liability for purposes of proof and allowance. *See Pepper v. Litton*, 308 U.S. 395, 60 S.Ct. 238 (1939). The Fifth Circuit incorrectly held that it must act to place limits on the equitable power of bankruptcy courts. *Edwards*, 6 F.3d at 319.⁵

The bankruptcy court's application of these equitable principles to preserve the status quo was hardly novel. *See In re A. H. Robins Co., Inc.*, 89 B.R. 555, 561 (E.D. Va. 1988); *In re Johns-Manville Corp.*, 68 B.R. 618 (Bankr. S.D.N.Y. 1988).

Such describes the conflict between Celotex' asbestos-related creditors, who will realize diminished shares of remaining assets in the bankruptcy case, and creditors like the Edwards, whose claims arise from the same asbestos-related problem, who seek payment in full

⁵ To make matters worse, the Fifth Circuit mistakenly relied on *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 80-81, 102 S.Ct. 2858, 2876 (1982), for its conclusion in that regard. *Northern Pipeline* decided only that a bankruptcy court did not have jurisdiction to try common law actions, as distinguished from such statutory actions that might be assigned by Congress. *Northern Pipeline* was not about equity at all, and it certainly was not about § 105 stays that are entered by bankruptcy courts to preserve the integrity of a bankruptcy estate.

of those claims, including disproportionate punitive damage amounts. The bankruptcy court dealt with this conflict in the administration of the Celotex Debtors' estates by preserving the status quo.

The Fifth Circuit's decision, on all fours with *Willis*, is in direct conflict with the Fourth Circuit.

II. Collateral Attacks On Orders In Other Circuits Are Impermissible

The bankruptcy court has the authority to determine its own jurisdiction and its determination, while open to direct review within the Eleventh Circuit, may not be assailed collaterally by the Fifth Circuit. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377 (1940).

Assuming *arguendo* that the bankruptcy court is totally wrong in its approach to the management of the Celotex bankruptcy case and should not or may not disallow huge punitive damage awards to personal injury creditors at the expense of compensating other personal injury creditors, such is remedied by appealing its decision within the Eleventh Circuit. In the last analysis, this Court's certiorari process on the merits is available. In this case, the Edwards' counsel *did* appear before the bankruptcy court, and lost. *Celotex*, 128 B.R. 478. Rather than obtain relief from the district court in Florida, counsel chose to forum shop in Texas.

The Fifth Circuit has ignored the accepted and usual course of judicial proceedings, bypassing the bankruptcy court's order that directs asbestos injury claimants with

claims against Celotex to apply for modification of the § 105(a) stay; also bypassing 28 U.S.C. § 158(a).⁶

The Edwards are entitled to appeal the bankruptcy court's order within the Eleventh Circuit, but not by collaterally attacking that order in the Fourth, Fifth or any other circuit. In the present case, the Fifth Circuit reaches its conclusion by an inapposite analysis about the supersedeas bond itself: first, the court notes that the § 105(a) stay order "does not, on its face, reach to third parties" *Edwards*, 6 F.3d at 318; second, the supersedeas surety, Northbrook Property and Casualty Insurance Company, "does not appear to be included on the face of the stay" *Id.*; third, *Northern Pipeline* justifies the court's "placing definite limits on the equity powers of bankruptcy courts" *Id.* at 319; and, finally, "section 105 simply does not give bankruptcy courts authority over assets that are not property of the debtor's estate and in which the debtor has no interest." *Id.* While much of this analysis is simply wrong, those issues are for another day. It is for the Eleventh Circuit to decide whether the bankruptcy court's § 105(a) stay is overbroad. 28 U.S.C. § 158(d).

There were more than 141,000 asbestos-related personal injury claims, and over \$70,000,000 in supersedeas bonds involving more than 100 bonded appeals, pending against Debtors when they filed for protection under Chapter 11 of the Bankruptcy Code. *Celotex*, 128 B.R. at 479; *Edwards*, 6 F.3d at 318. Obviously, the Celotex bankruptcy case does not present the typical debtor-creditor

⁶ *Supra*, p.2.

relationship. The intertwining of (a) Celotex supersedeas bonds, wherever posted, (b) the assets transferred by Celotex to sureties to obtain supersedeas bonds, and (c) Celotex' bankruptcy estate is absolutely clear. The bankruptcy court wrote:

Debtor, in all instances, has collateralized the supersedeas bonds. The collateral has taken various forms, but one type in particular is illustrative of the linkage associated with irreparable harm. Debtor and many of its insurers on asbestos claims have settled long-ongoing disputes over insurance coverage. Some of these settlement agreements established the maximum amount of insurance coverage, provided for payment to Debtor of these coverage amounts over time, *and provided such payments and contract rights could be held by the insurance company as collateral for supersedeas bonds issued on behalf of Debtor in some of the asbestos cases. . . .*

Celotex, 140 B.R. at 914-15 (emphasis added).

The Fifth Circuit is incorrect in its writing that the bankruptcy court's order does not reach the workings or "proceedings" of the Northern District of Texas. Certainly, neither § 105 nor any decisional authority permits a bankruptcy court to order matters in a trial court, federal or state. However, the bankruptcy court's omnibus § 105(a) stay is directed to any judgment creditor of Celotex seeking to collect the judgment. *Celotex*, 128 B.R. at 478. As a matter of judicial administration, state and federal trial courts that administratively close or suspend pending matters involving debtors when confronted with a bankruptcy court stay order are now told

by the Fifth Circuit that parties' ignoring such orders is appropriate.

The result in this particular case is that the district court has entered its order, and would in all likelihood enforce that order by directing the marshal to seize the surety's assets. The problem is that the surety wrote the bond only because Celotex posted collateral. That collateral is property of the Celotex bankruptcy estate.⁷ *Celotex*, 128 B.R. at 481; *Celotex*, 140 B.R. at 915. Under the guise of a Rule 65.1 execution order, the district court wrongly exercised its jurisdiction to effectuate a preference in favor of respondents *vis a vis* other asbestos creditors.⁸ Fed.R.Civ.P. 65.1 does not constitute either a new cause of action or a remedy. Rather, it provides a forum for execution without the necessity of the judgment creditor's commencing a new lawsuit to claim entry of judgment against the surety, enabling him to execute. Rule 65.1 is not designed to overcome such orders as the bankruptcy court enters for purposes of the Bankruptcy Code.

The Fifth Circuit's statement that it "merely declares this court's power to protect and preserve supersedeas bonds posted in our district courts", *Edwards*, 6 F.3d at

⁷ The bankruptcy court fully explained the mechanism of Celotex utilizing its insurance proceeds to collateralize the supersedeas bonds. "Northbrook, also Celotex' insurer, secured [its] participation in the bond using insurance proceeds remaining to be paid to Celotex under a settlement agreement resolving coverage disputes between Northbrook and Celotex." *Celotex*, 140 B.R. at 915.

⁸ The upshot of its opinion is that district court judges in Texas have jurisdiction to perform the Middle District of Florida's bankruptcy business.

321, encourages forum shopping, not to mention the flawed premise. There is no showing of a need for the court's "protection and preservation" of bonds posted in any district court.

The Fifth Circuit's reasoning and statements have an unsuspected harmful effect. In the court's section III about 11 U.S.C. § 362(a) *automatic stays*, the court wrote that § 362(a) "limits the bankruptcy court to stays in only those proceedings in which the debtor or his . . . property is in controversy." *Edwards*, 6 F.3d at 316.⁹

Next, the court observes that the § 362(a) *stay* is not applicable to preclude actions against the surety. *Id.* at 317. Then, in its section IV discussion about § 105, the court, perhaps forgetfully, states that it has "shown" in section III that the debtor's property cannot be "extended to include the separate obligations of a non-bankrupt surety." *Id.* at 318. Overlooking the regrettable syntax and the fact that property is not "extended", the court has effected a colossal *non sequitur*. Of course, a perfectly good argument is made that the § 362(a) *automatic stay* does not preclude suits against supersedeas bond sureties, the reason being that sureties' assets are not the debtors' assets. But, in this case, the particular surety's obligation is collateralized by Celotex' assets. This is precisely the

⁹ It is patently incorrect for the court to state that § 362(a) "limits the bankruptcy court." Section 362(a) operates as an *automatic stay* of many proceedings, including court actions. This statute contains no "limits" that the bankruptcy court must observe. The "limits" apply to parties in other court cases, state and federal.

reason why the bankruptcy court entered its § 105(a) stay order.

Finally, Celotex emphasizes that the Court is not faced at this point with a global approach to the Bankruptcy Code's § 105 and the equity powers of the bankruptcy court. If there is to be such an analysis, it is appropriately addressed if and when the Eleventh Circuit is presented with the bankruptcy court's § 105(a) stay. For now, the question is whether any court outside the Eleventh Circuit has jurisdiction to order execution of supersedeas bonds in the face of the bankruptcy court's order to the contrary.

CONCLUSION

The Court should issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

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App. 1

**Bennie EDWARDS and Joann Edwards,
Plaintiffs-Appellees,**

v.

**ARMSTRONG WORLD INDUSTRIES, INC., et al.,
Defendants,**

**The Celotex Corporation,
Defendant-Appellant.**

No. 92-1557.

**United States Court of Appeals,
Fifth Circuit.**

Nov. 5, 1993.

**On Petition for Rehearing and Suggestion
for Rehearing En Banc Dec. 22, 1993.**

In Chapter 11 case, bankruptcy court issued order staying all proceedings against debtor including proceedings where matter was on appeal and supersedeas bond had been posted by debtor. Judgment creditors in asbestos litigation moved in district court to enforce supersedeas bond against surety after debtor lost appeal for which bond was posted. The United States District Court for the Northern District of Texas, David O. Belew, Jr., J., granted execution against surety on bond. Debtor filed notice of appeal. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) district court had jurisdiction to evaluate whether motion to execute on supersedeas bond fell under exclusive jurisdiction of bankruptcy court; (2) automatic stay provision of Bankruptcy Code could not be invoked to prevent judgment creditors from pursuing surety of supersedeas bond once debtor lost appeal for which bond was posted; and (3) equitable powers of bankruptcy court did not permit bankruptcy

App. 2

court to enjoin judgment creditors from pursuing action to execute on supersedeas bond once debtor lost appeal for which bond was posted.

Affirmed.

Edith H. Jones, Circuit Judge, specially concurred and filed opinion.

See also 152 B.R. 667.

Kevin F. Risley, Butler & Binion, Houston, TX, Jeffrey W. Warren, Wendy V. E. England, Bush, Ross, Gardner, Warren & Rudy, Tampa, FL, for defendant-appellant.

Brent M. Rosenthal, Dallas, TX, for plaintiffs-appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before POLITZ, Chief Judge, GOLDBERG and EDITH H. JONES, Circuit Judges.

GOLDBERG, Circuit Judge:

This case epitomizes the way that toxic tort litigation has corroded our judicial system. Here we have an asbestos poisoning dispute in which the defendant has sought the protection of the bankruptcy laws to shield itself from the multitude of claims generated by this one-time miracle fabric turned cancer-causing nightmare. To the bankruptcy court now falls the herculean task of managing the problems generated by the unprecedented magnitude of these disputes. It is this court's duty to insure that the case management tools the bankruptcy

App. 3

court utilizes to control these conflicts do not overwhelm its primary obligation to dispense justice.

The precise question before us centers around the power of bankruptcy courts to stay proceedings pending in other courts which might have some effect on the ability of the bankruptcy judge to manage the estate. The Bankruptcy Code provides judges with those equitable powers essential to serving the twin aims of bankruptcy law; protecting the debtor from the tentacles of his or her creditors and, fair distribution of the estate. *See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 5963, 6296-97.* We must decide what limits must be placed on the bankruptcy court's power to insure that both debtors and creditors remain adequately protected.

No usurpation is intended in this decision to denigrate the powers of the bankruptcy court, nor did we intend any trespass upon the metes and bounds of bankruptcy courts' treasured turfs. Indeed, neither side to this controversy has a perpetual lease or any tenure of ownership that is infrangible and indestructible. It is not a struggle between any potential usurpers. Instead, both the district court and the bankruptcy court should both use what they think are appropriate transits and calipers in surveying their jurisprudential turfs.

While cognizant of the repercussions that our opinion may have on other disputes, parties, etc., we should be careful to make decisions based only upon the merits of the particular cases before us. In the instant case, plaintiffs wish to execute a supersedeas bond against a non-bankrupt surety. Because the appeal for which the

bond was posted has terminated, the bankrupt and therefore also the bankruptcy court have lost any control over this asset. Consequently, we decline to extend the reach of the bankruptcy court's authority to stay these proceedings and we affirm the ruling of the district court in releasing the supersedeas bond to the plaintiffs.

I. Facts

In April of 1989, the United States District Court for the Northern District of Texas entered a \$281,025.80 judgment in favor of Bennie and Joann Edwards and against the Celotex Corporation ("Celotex") for asbestos-related injuries. To stay execution on this judgment while pursuing an appeal, Celotex posted a supersedeas bond for \$294,987.88. Northbrook Property and Casualty Insurance Company ("Northbrook") served as surety on the bond. Northbrook, also Celotex' insurer, secured their participation in the bond using insurance proceeds remaining to be paid to Celotex under a settlement agreement resolving coverage disputes between Northbrook and Celotex.

In an opinion issued on September 20, 1990, this court affirmed the plaintiff's judgment against Celotex. *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151 (5th Cir.1990). Celotex did not move for rehearing or a stay of the mandate and, on October 12, 1990, the mandate issued. That same day, Celotex filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida.

The filing of Celotex' Chapter 11 petition automatically stayed the continuation of all "proceedings against

any of the Debtors" and the commencement of "any act to obtain possession of property of any of the Debtors." 11 U.S.C. §§ 362(a)(1) and (3). On October 17, 1990, the bankruptcy judge augmented the protection afforded the Debtors by the automatic stay, employing the broad equitable powers available to bankruptcy judges under 11 U.S.C. § 105. The bankruptcy judge issued an order staying all proceedings against Celotex, including those proceedings where "the matter is on appeal and a supersedeas bond has been posted by the Debtors."¹

On May 3, 1991, the plaintiffs filed a motion in the district court seeking to enforce the supersedeas bond against Northbrook as surety on the bond. See Fed.R.Civ.P. 65.1.² Northbrook and Celotex opposed this

¹ See Order Granting Emergency Motion for Determination of Applicability of § 362 Stay to Pending Matters Or, in the Alternative, for Extension of § 362 Stay Pending Matters. The pertinent section of this order reads: "3. Notwithstanding any exceptions or limitations to the automatic stay contained in § 362(b) of the Code, all Entities are hereby jointly and severally stayed, restrained and enjoined from commencing or continuing any judicial, administrative or other proceeding involving any of the Debtors regardless of (a) who initiated the proceeding, (b) whether the matter is on appeal and a supersedeas bond has been posted by the Debtors or (c) the appellant in an appeal is one of the Debtors."

² Federal Rule of Civil Procedure 65.1 states, "Whenever these rules . . . require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action."

motion, asserting that any proceeding to execute the bond was stayed by the Celotex bankruptcy.

However, let us be absolutely clear that the bankruptcy court's order does *not*, on its face, apply to the proceedings to execute the supersedeas bond against Northbrook. A careful reading of the bankruptcy court's order reveals that it forbids all proceedings or claims involving the *debtor*, and makes no reference to proceedings against third parties. Thus the section 105 stay would not, as written, prevent the district court from executing the bond against Northbrook.³

The district court entered the Bond Order on May 27, 1992 granting execution against Northbrook on the bond. Thereafter, Celotex filed its notice of appeal.

II. Jurisdiction

The threshold question in this appeal is whether the district court had jurisdiction to determine the applicability of the bankruptcy court's stay. Celotex argues that the district court lacked jurisdiction to consider the plaintiffs' motion to execute the supersedeas bond

³ As a relevant aside, we take note of the fact that the bankruptcy court in this case held that the stay as issued does apply to the proceedings in this case. See *In re Celotex Corp.*, 128 B.R. 478, 484 (Bankr.M.D.Fla.1991) ("[w]here bankruptcy courts in 'mega' cases such as this are required to deal with complex litigation involving numerous parties, joint and several liability, and multi-million dollars in claims and assets, not to mention potential conflicts with other judicial determinations, the powers of the bankruptcy court under Section 105 must in the initial stage be absolute.")

because the bankruptcy court in Florida, where Celotex' Chapter 11 case is pending, has exclusive jurisdiction over all issues related to the Bankruptcy. 28 U.S.C. § 1334(a) and (d). The difficulty underlying the determination of whether the district court had jurisdiction to hear the plaintiffs' motion is that this issue turns on the question of whether the bond is part of the Debtor's estate. However, this question is bound up in the merits of appellant's claim.

The jurisdictional grant of 28 U.S.C. § 1334(d) gives the bankruptcy court "exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case."⁴ This jurisdictional grant is limited by section 1334(b) which provides that the bankruptcy court only has "original but not exclusive jurisdiction of all civil proceedings . . . related to cases under title 11." 28 U.S.C. 1334(b) (emphasis added). Thus we can rephrase the first question presented in this appeal as follows: whether the district court's order implicates property of the estate and therefore falls under the exclusive jurisdiction of the bankruptcy court or instead is considered a [sic] merely a related matter over which the district court could properly exercise jurisdiction.

This court has previously held that district courts have jurisdiction to determine whether a bankruptcy court stay applies to proceedings before it. In *Hunt v. Bankers Trust Co.*, this court ruled that the issue of whether "the stay applies to litigation otherwise within

⁴ The bankruptcy courts sit under the auspices of the district court in the jurisdiction for which they operate. 28 U.S.C. § 157(a).

the jurisdiction of a district court or court of appeals is an issue of law within the competence of both the court within which the litigation is pending . . . and the bankruptcy court." 799 F.2d 1060, 1069 (5th Cir.1986) (citing *In re Baldwin - United Corp. Litigation*, 765 F.2d 343, 347 (2d Cir.1985)); see also, *Picco v. global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir.1990) (district courts retain jurisdiction to determine applicability of stay of litigation pending before them). The district court had jurisdiction to evaluate whether the motion to execute the supersedeas bond would fall under the exclusive jurisdiction of the bankruptcy court.

III. Automatic Stay

We now turn to whether the automatic stay, 11 U.S.C. 362(a), prevents the district court from proceeding with the execution of the supersedeas bond. The automatic stay provisions of the Bankruptcy Code enable bankruptcy courts to take control of all of the assets of the debtor giving the court opportunity to survey the landscape of debtor's financial condition before reorganizing the estate. *Hunt v. Bankers Trust Co.*, 799 F.2d at 1069.

A victorious plaintiff who obtains a bare judgment against a defendant becomes an unsecured judgment creditor of that defendant. The judgment is payable immediately, but a defendant may obtain stay of execution on the judgment by posting a supersedeas bond. See Fed.R.Civ.P. 62(d). A defendant who posts a supersedeas bond retains a reversionary interest in the bond subject to divestment.

In many cases, the supersedeas bond will be posted by a third party. See e.g. *Southmark Corp. v. Riddle (In re Southmark Corp.)* 138 B.R. 820, 824-25 (Bankr.N.D.Tex. 1992). In exchange for agreeing to post the supersedeas bond, the third party normally takes some sort of security from the judgment debtor. *Id.* In this case, Northbrook acted as surety on the bond securing its interest with insurance proceeds from Celotex' policy with Northbrook. See *In re Celotex Corp.*, 128 B.R. at 480.

Celotex argues that as the judgment debtor, it has an identity of interest with Northbrook as the surety of the supersedeas bond. Therefore, they reason that the bankruptcy court was justified in applying section 362 to stay any proceeding against Northbrook. Celotex cites the Fourth Circuit decision in *A.H. Robbins Co. v. Piccinin (In re A.H. Robbins)* in which the court held that " 'there are cases [under 362(a)(1)] where a bankruptcy court may properly stay the proceedings against non-bankrupt co-defendants'. . . . [This occurs] when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor." 788 F.2d 994, 999 (4th Cir.1986) cert. denied 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986) (citing *Johns-Manville Sales Corp.*, 26 B.R. 405, 410 (Bankr. S.D.N.Y.1983)).

Celotex argues that because Northbrook received a security interest in the insurance proceeds, releasing the bond to the plaintiffs will allow Northbrook to automatically recover its rights to those proceeds. This result would diminish the total amount available to be paid out to the remaining claimants. Therefore, appellants ask us

to allow the bankruptcy court to stay execution on the supersedeas bonds in order to preserve as much of the debtor's estate as possible.

The wording of section 362(a) belies Celotex' argument. The statute states that the automatic stay is applicable to "(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative or other action or proceeding against the debtor . . . (3) any act to obtain possession of property of the estate." Thus the statute limits the bankruptcy court to stays in only those proceedings in which the debtor or his or her property is in controversy. Because this is suit against Northbrook, not the bankrupt, the only way the automatic stay could apply is if the court finds that the bond is property of the debtor's estate.

We recognize that the Bankruptcy Code defines property of the estate quite broadly to include "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. 541(a)(1). See *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198, 204, 103 S.Ct. 2309, 2313, 76 L.Ed.2d 515 (1983) (holding that the definition of property of the estate includes property in which debtor no longer has a possessory interest). Nevertheless, we do not believe that this definition is so broad as to include the kind of interest under consideration in the present case.

In considering the same issue in a case involving another asbestos claimant to the Celotex estate, the court in *Willis v. Celotex Corp.* rejected Celotex' reasoning, stating that the guarantor has a duty "separate from and independent of Celotex' duty to pay the judgments." 978

F.2d 146, 148 (4th Cir.1992) *cert. denied* ___ U.S. ___, 113 S.Ct. 1846, 123 L.Ed.2d 470 (1993). Because there was no identity of interest between Celotex and its guarantor, the proceedings against the guarantor of the supersedeas bond were not stayed under § 362(a)(1). *Id.* at 149. The obligations of a surety are sufficiently independent to provide the basis of an action by the judgment creditor to collect on the bond unfettered by the automatic stay provisions of the Bankruptcy Code.

In an analogous case this court decided that any payments made under a secured letter of credit do not constitute property of the debtor. *Kellogg v. Blue Quail Energy Inc. (In re Compton Corp.)* 831 F.2d 586, 589 (5th Cir.1987), *modified on other grounds*, 835 F.2d 584 (1988) ("When the issuer honors a proper draft under a letter of credit, it does so from its own assets and not from the assets of [the debtor] who caused the letter of credit to be issued"). Because the letter of credit is not part of the Debtor's estate, we ruled that the bankruptcy court could not enjoin a payment of funds from the letter of credit to the beneficiary. *Id.* This court reasoned that central to the letter of credit is the independence principle in which the "issuers obligation to the letter of credit beneficiary is independent from any obligation between the beneficiary and the issuer's customer." *Id.* at 590.

The concerns which the court considered relevant to the letter of credit are similarly relevant to the surety-debtor relation at issue here. *In re Southmark*, 138 B.R. at 828 ("the supersedeas bond or undertaking on appeal resembles the secured letter of credit"). The promise of the bank to pay on a letter of credit is indistinguishable

from Northbrook's promise to act as surety on the supersedeas bond. In both cases the promise is to perform an obligation of the debtor when and if the debtor becomes unable to do so itself. The surety's obligation on a supersedeas bond once the appeal has been completed is as separate and independent from the principal's obligation, as is the bank's obligation on a letter of credit. Thus the automatic stay provisions of § 362(a) do not apply to the guarantor of a supersedeas bond because the bond is not property of the bankrupt's estate once the bond has matured and become enforceable. It was therefore proper for the district court to allow the judgment plaintiffs to execute the supersedeas bond against the surety as a separate and independent obligor on the debt.

The bankruptcy court holding jurisdiction over Celotex' bankruptcy itself admitted that "[w]here a debtor, upon the filing of the bankruptcy petition, is an unsuccessful appellant in the total appellate process, or during the bankruptcy case is unsuccessful in its appeal, its property interest in the bond can be divested and any efforts by the debtor to prevent the judgment creditor from proceeding against the supersedeas bond must be sought under Section 105 of the Bankruptcy code." *In re Celotex Corp.*, 128 B.R. at 482. In this case, because the appeal has been completed and mandate issued, the claim Celotex may have once had on the supersedeas bond has thereby terminated.

This opinion should not be read to infer that the bankruptcy court lacked authority to issue a stay order over supersedeas bonds generally. Our decision today is limited to the holding that the bankruptcy court lacked authority over this particular supersedeas bond. Because

the appellate process had been completed and Celotex no longer had an interest, reversionary or otherwise, in this particular supersedeas bond, the automatic stay provisions will not prevent Northbrook from fulfilling its obligation.

While we need not state the precise reach of § 362(a) to third parties, we hold that the automatic stay cannot be invoked to paralyze judgment creditors from pursuing the surety of a supersedeas bond once the debtor has lost the appeal for which the bond was posted.

IV. Section 105 Stay

Turning now to the more difficult issue raised by this appeal, we confront the question of whether the equitable powers granted bankruptcy courts apply to the type of non-debtor third parties present here.

Celotex argues that section 105 of the Bankruptcy Code gives bankruptcy courts virtually limitless ability to bring parties to heel to its authority. Section 105(a) states, in part, that the bankruptcy "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." In *In re S.I. Acquisition, Inc.* this court recognized that a bankruptcy court has broad discretionary power under section 105 to affirmatively stay proceedings in other courts. 817 F.2d 1142, 1146 n. 3 (5th Cir.1987); *Wedgeworth v. Fibreboard Corp.* 706 F.2d 541, 545 (5th Cir.1983).

The jurisdiction of bankruptcy courts has been extended to include stays on proceedings involving third parties under the auspices of 28 U.S.C. § 1334(b) which

provides for jurisdiction of the bankruptcy court for matters "related to a case under title 11."⁵ Appellant argues that under this jurisdictional grant, the equitable powers of the bankruptcy court are sufficient to stay a proceeding to release the supersedeas bond.

The Fourth Circuit in *Willis*, examining the very same section 105(a) order at issue in this case, decided that the bankruptcy court's power was sufficient to stay proceedings against third parties on supersedeas bonds. The court based its reasoning upon the "magnitude of the task [the bankruptcy court] faced in attempting to oversee the bankruptcy proceedings, resulting from the sheer number of pending personal injury cases in which supersedeas bonds had been posted." 978 F.2d at 149. The number of cases against Celotex is, in fact, quite staggering. Over 141,000 asbestos related bodily injury claims were pending against the debtor Celotex at the time it filed for bankruptcy. *In re Celotex Corp.*, 128 B.R. at 480. Of those, over 100 cases had appeals pending, in support of which Celotex claims to have posted over \$70 million in supersedeas bonds. *Id.* In light of the "extraordinary facts presented by the Celotex bankruptcy" 978 F.2d at 147, the *Willis* court concluded that a stay of proceedings to prevent enforcement of supersedeas bonds was a proper exercise of the bankruptcy court's authority under section 105(a).

⁵ In considering the question of whether co-defendants are included within a § 105 stay, this court held that § 105 "does empower the bankruptcy court to stay proceedings against non-bankrupt entities." *In re S.I. Acquisition*, 817 F.2d at 1146 n. 3. See also *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93 (2nd Cir. 1988) (section 105 allows stays against third party insurers).

It is important to remember that the section 105 stay issued by the bankruptcy court does not, on its face, reach to third parties. Thus, taking the bankruptcy court at its word, we are unable to see how the section 105 order could reasonably be applied to the present proceedings which involve a separate and independent third party obligation. The bankruptcy court stay was written to apply only to the debtor and its property. As we have shown in the preceding section, the property of the debtor cannot be extended to include the separate obligations of a nonbankrupt surety. Our decision in *Blue Quail* is particularly relevant as to the separateness of guaranty obligations from the property of a debtor's estate.

However, this court has at times found it appropriate to broadly construe bankruptcy court stays to apply beyond the property of the debtor. *In re Davis*, 730 F.2d 176, 183 (5th Cir.1984) (exercising the bankruptcy court's stay powers against non-debtor third parties when the proceedings in question "pose a significant threat to the estate.") Indeed, the bankruptcy court in this case has ruled that the stay, in its present state, would apply to enjoin the Edward's proceedings against Northbrook to execute the supersedeas bond. *In re Celotex Corp.*, 128 B.R. at 484. The bankruptcy court has decided that even when, "the judgment creditor has been successful throughout the appellate process, the judgment creditor is not able to proceed against the supersedeas bond without seeking to vacate the section 105 stay in this Court." *Id.*

Therefore, we cannot simply assume that because Northbrook does not appear to be included on the face of the stay, the bankruptcy court will exempt it from the reach of the stay. The issue presented in this appeal must

then be sharpened to the question of whether prudential (or other) considerations justify extending the bankruptcy court's jurisdiction to the point where it includes the power to stay the proceedings in question here.

The Supreme Court has made clear the importance of placing definite limits on the equity powers of bankruptcy courts. See *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 80-81, 102 S.Ct. 2858, 2876, 73 L.Ed.2d 598 (1982) (plurality opinion) (holding that because bankruptcy courts are non-Article III courts they must be limit in function and authority). This court has itself previously limited the powers of bankruptcy courts in *Wedgeworth v. Fibreboard Corp.* where we held that, "[a]lthough we recognize the court's broad discretion in this area, such control is not unbounded. Proper use of this authority calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.[]" 706 F.2d at 545 (citing *Landis v. North American Co.*, 299 U.S. 248, 254-55, 57 S.Ct. 163, 165-6, 81 L.Ed. 153 (1936)).

While we recognize the burdens which have been placed upon the bankruptcy court by the immensity of litigation pending in this case, we disagree with the Fourth Circuit's proposed solution in *Willis*. We believe that we cannot afford to shut down the dispensation of justice simply because there is a bankruptcy.⁶ Although the idea of using the bankruptcy court as a clearing house

⁶ The court in *Willis* expressed the hope that the bankruptcy court will quickly rule on the motion for relief from the stay. 978 F.2d at 149 n. 5. At this point, aspirations for an expeditious resolution appear quixotic at best.

for all of these cases may seem desirable as a policy matter, section 105(a) simply does not give bankruptcy courts authority over assets that are not property of the debtor's estate and in which the debtor has no interest. We cannot globalize the bankruptcy court's authority in this manner.

Celotex made a promise to the prevailing plaintiffs (and the court) by posting the supersedeas bond that the bond would "secure[] the prevailing party against any loss sustained as a result of being forced to forgo execution on a judgment during the course of an ineffectual appeal" *Poplar Grove Planting and Refining Co., v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir.1979); *Federal Prescription Service, Inc. v. American Pharmaceutical Association* 636 F.2d 755 (D.C.Cir.1980) (describing the purpose of supersedeas bond to secure appellee in cases where there is some chance of the judgment debtor being unable or unwilling to satisfy the judgment). Supersedeas bonds serve as an obligation on an appellant to insure that an appellee who is deprived of the immediate opportunity to collect his or her judgment will not be prejudiced by the delay.

Allowing appellant to file for bankruptcy and thereby stay execution on the supersedeas bond would eviscerate the very purpose of these bonds. Once the appeal is decided and mandate has issued, the judgment creditor has an enforceable right to collect that which the trial court has previously determined is rightfully his or her own. The supersedeas bond was posted to cover precisely the type of eventuality which occurred in this case, insolvency of the judgment debtor. It is manifestly unfair to force the judgment creditor to delay the right to

collect with a promise to protect the judgment only to later refuse to allow that successful plaintiff to execute the bond because the debtor has sought protection under the laws of bankruptcy.

Furthermore, this argument is buttressed by the fact that it is the purpose of the surety relation to provide creditors with another avenue to pursue the debt. Becoming the surety on the supersedeas bond, Northbrook took the place of the judgment creditor in bearing the risk that Celotex would be unable to pay the debt. *See Blue Quail*, 831 F.2d at 589-90. (holding that for letters of credit, "the shifting of liability to the bank rather than to the [creditor] is the main purpose of the letter of credit. After all, the bank is in a much better position to assess the risk of its customer's insolvency."). If we permit Northbrook to escape its liability by taking refuge under the protective umbrella of Celotex' Title 11 bankruptcy proceedings, we would thereby doubly disappoint the Edwards plaintiffs by first delaying their judgment under a supersedeas bond which they can no longer execute and then, second, failing to enforce the promise made by Northbrook to guarantee that bond. We should not, unless absolutely compelled, let such an unjust result stand. There are no such compulsions here.

Section 105 authorizes a bankruptcy court to enjoin litigants from pursuing actions pending in other courts that threaten the integrity of a bankrupt's estate. *In re Davis*, 730 F.2d at 184. However, the integrity of the estate is not implicated in the present case because the debtor has no present or future interest in this supersedeas

bond.⁷ Whatever the ultimate scope of section 105, it does not extend so far as to give the bankruptcy court authority over a supersedeas bond in which the debtor has no interest. Because the appeal has terminated and mandate issued, the surety's liability on the bond matured and the judgment creditors should be allowed to collect.

In coming to the opposite conclusion from the decision we reach today, the *Willis* court held that the "hiatus from execution on the bonds was necessary to permit the bankruptcy court to take control of the immense litigation." 978 F.2d at 150. The idea of hiatus employed by the Fourth Circuit parallels the intent Congress manifested in providing equitable powers to the bankruptcy court in the first place. The power to stay proceedings in other courts was intended as a provisional measure to afford "the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions." 1978 U.S.C.C.A.N. at 6296-97. In order that this

⁷ The status of the surety agreement which allegedly gives Northbrook a collateralized interest in insurance proceeds owed to the debtor Celotex is not sufficiently demonstrated to suggest that Northbrook and Celotex indeed have an identity of interest such that executing against Northbrook would be the same as proceeding against the property of the debtor. In this respect, the bankruptcy court was correct when it held that "whether a debtor can reject or assume the surety agreement or avoid it and thus seek return of the collateral may be an issue solely between the debtor and its surety. *In re Celotex*, 128 B.R. at 481.

In addition, we lack evidence of the effect of the agreement between Celotex and Northbrook other than generalized statements by Celotex unrelated to the situation of these plaintiffs. We cannot base a decision on a document that was not presented to the court.

breathing spell not suffocate the creditor's claims, we must take care to insure that the hiatus not extend to the point where it becomes a permanent vacation.

In this case, the judge granted the original stay almost three years ago. The complexities of this litigation make it likely that a satisfactory and fair dispensation of Celotex' assets will be a long time coming. We cannot allow the concern for resolving the monstrous tangle of conflict and contradiction to overwhelm our duty to do justice to these plaintiffs. Due to the likelihood of any stay becoming a perpetual prohibition on plaintiffs collecting their judgment, we hold that the stay is not within the equitable powers of the bankruptcy court for the situation at bar.

These plaintiffs have survived many long years fighting through the system. On October 12, 1990, they emerged with what appeared to be a final victory in this protracted litigation. Greeting them was Celotex, postponing the plaintiff's relief with the claim that because there are so many other victims of this terrible poison, the Edwards will have to postpone yet again the day in which they receive what is their due. It is our job to see that they wait no longer. The Edwards were specifically promised by the court and by Celotex that they could look to the supersedeas bonds if they won on appeal and we should be careful to see that their expectations are not nullified because of a generalized and theoretical concern for the bankrupt's estate.

We conclude by calling attention one last time to the fact that this circuit in *Blue Quail* did not bow in complete obeisance to a bankruptcy court stay. Fairness and equity

require that we also not bow in this case where the Edwards' claim is all the more compelling. Having completed the appellate process before the debtor went into bankruptcy, the supersedeas bond matured, and the district court acted properly in executing the bond against Northbrook.

V.

For the reasons stated above, we AFFIRM.

EDITH H. JONES, Circuit Judge, specially concurring:

I agree wholeheartedly with Judge Goldberg's analysis showing the inapplicability of the § 362 stay to this case and with his interpretation of the plain meaning of the Celotex bankruptcy court's § 105 stay order. Because the § 105 stay order did not purport to reach the district court's order against Northbrook in this case, however, I would not reach the question of the bankruptcy court's power to issue such an order.

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

Dec. 22, 1993.

Before: POLITZ, Chief Judge, GOLDBERG and
EDITH H. JONES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on

rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

A few explanatory words are offered. Appellants contend that we should not collaterally attack an order of a bankruptcy court sitting under the jurisdiction of the Eleventh Circuit. This contention fails for two reasons. Primarily, the bankruptcy court's order does not purport to reach the proceedings in this case and therefore executing the supersedeas bond does not infringe on the Eleventh Circuit's proper jurisdiction. Secondarily, our opinion merely declares this court's power to protect and preserve supersedeas bonds posted in our district courts. Thus, we have not held that the bankruptcy court in Florida was necessarily wrong; we have only concluded that the district court, over which we do not have appellate jurisdiction, was right.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
TEXAS WICHITA FALLS DIVISION

BENNIE EDWARDS and	§	
JOANN EDWARDS	§	
VS.	§	CIVIL ACTION
	§	NO. 7-87-0050
THE CELOTEX CORPORATION,	§	
ET AL.	§	

ORDER

(Filed May 27, 1992)

CAME ON TO BE HEARD plaintiffs' Motion for Release of Supersedeas Bond, and the court, being advised of the premises, is of the opinion that said motion has merit and should be granted. It is therefore

ORDERED that plaintiffs may execute on the supersedeas bond executed by Northbrook Property and Casualty Insurance Company on May 17, 1989 to secure the judgment entered in plaintiffs' favor against the Celotex Corporation in the above styled and numbered cause.

Signed this 27th day of May, 1992.

/s/ David O. Belew, Jr.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
TEXAS WICHITA FALLS DIVISION

BENNIE EDWARDS, et al.,	*	
	*	
Plaintiffs,	*	CIVIL ACTION
VS.	*	NO. CA 7-87-50
	*	
CELOTEX CORPORATION, et al.,	*	
	*	
Defendants.	*	

JUDGMENT

(Filed April 17, 1989)

This action came on for trial before the Court and a jury, and issues having been duly tried and the jury having duly rendered its verdict,

It is ORDERED, ADJUDGED and DECREED that the Plaintiffs recover from defendant, the Celotex Corporation, the following sums:

1. Bennie Edwards shall recover past damages in the sum of Ten Thousand, One Hundred Ninety-Five Dollars and Sixty Cents (\$10,195.60), with prejudgment interest at the rate of 10% per annum to accrue from September 21, 1986 until the date of this judgment, and future damages in the sum of Fourteen Thousand, Two Hundred Eighty-Eight Dollars and Twenty Cents (\$14,288.20).

2. Joann Edwards shall recover past damages in the sum of Three Thousand, Five Hundred Ninety Dollars and No Cents (\$3,590.00), with prejudgment interest at the rate of 10% per annum to accrue from September 21,

1986 until the date of this judgment, and future damages in the sum of Seven Thousand, One Hundred Eighty Dollars and No Cents (\$7,180.00).

It is further ORDERED, ADJUDGED and DECREED that Plaintiffs, Bennie Edwards and Joann Edwards, recover from Defendant, Celotex Corporation, punitive damages in the sum of Two Hundred Forty-Five Thousand, Five Hundred Dollars and No Cents (\$245,500.00).

It is further ORDERED, ADJUDGED and DECREED that Plaintiffs, Bennie Edwards and Joann Edwards, shall recover from Defendant, Celotex Corporation, their costs of this action, and interest on the judgment at the rate of 9.51% per annum as provided by law from the date of this judgment.

ENTERED this 17th day of April, 1989.

/s/ Mary Lou Robinson
MARY LOU ROBINSON
UNITED STATES DISTRICT
JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE:	Chapter 11
THE CELOTEX CORPORATION, et al.,	Consolidated Case Nos.:
Debtors.	90-10016-8B1 and 90-10017-8B1

ORDER GRANTING EMERGENCY MOTION
FOR DETERMINATION OF APPLICABILITY OF §362
STAY OF PENDING MATTERS OR, IN THE
ALTERNATIVE, FOR EXTENSION OF
§362 STAY TO PENDING MATTERS

THIS CAUSE came before the Court upon the Debtors' Motion for Determination of Applicability of §362 Stay to Pending Matters or, in the Alternative, for Extension of §362 Stay to Pending Matters (the "Motion"). There being no objection hereto by the United States Trustee, and the Court having considered the Motion, the arguments of counsel regarding the merits of the Motion, the record in the case and being otherwise duly advised in the premises, finds that this Court pursuant to 28 USC §1471(e), has exclusive jurisdiction of all of the property of The Celotex Corporation and Carey Canada Inc., wherever located, and that this Court, pursuant to §§105 and 362 of the Bankruptcy Code, may issue any order, process or judgment as may be necessary or appropriate to carry out the provisions of the Bankruptcy Code and sufficient cause appearing therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. Debtors' Motion be, and the same is, hereby granted.

2. All persons (including individuals, partnerships and corporations, and all those acting for or on their behalf), and all governmental units (including the United States of America and any State, Commonwealth, District, Territory, municipality, department, agency or instrumentality of the United States, a State, a Commonwealth, a District, a Territory, a municipality, a foreign state, or other foreign or domestic governments, and all those acting for or on their behalf and all other entities (collectively, "Entities") be and each of them are hereby stayed, restrained and enjoined from:

- a. Commencing or continuing, including issuing or employing process, any judicial, administrative or other proceeding against any of the Debtors that was or could have been commenced before the commencement of the Debtors' Chapter 11 cases, or recovering a claim against any of the Debtors that arose before the commencement of the Debtors' Chapter 11 cases;
- b. Enforcing, against any of the Debtors or against property of any of the Debtors, a judgment obtained before the commencement of the Chapter 11 cases;
- c. Taking any act to obtain possession of property of any of the Debtors or of property from any of the Debtors;
- d. Taking any act to create, perfect or enforce any lien against property of any of the Debtors;

- e. Taking any act to create, perfect or enforce against property of any of the Debtors, any lien to the extent that such lien secures a claim that arose before the commencement of the Chapter 11 cases;
- f. Taking any act to collect, assess, or recover a claim against any of the Debtors that arose before the commencement of the Chapter 11 cases; and
- g. Offsetting any debt owing to any of the Debtors which arose before the commencement of the Chapter 11 cases against any claim against any of the Debtors.

3. Notwithstanding any exceptions or limitations to the automatic stay contained in §362(b) of the Code, all Entities are hereby jointly and severally stayed, restrained and enjoined from commencing or continuing any judicial, administrative or other proceeding involving any of the Debtors regardless of (a) who initiated the proceeding, (b) whether the matter is on appeal and a supersedeas bond has been posted by the Debtors or (c) the appellant in an appeal is one of the Debtors.

4. On request of a party in interest, and after not less than thirty (30) days' written notice to the attorneys for the Debtors, and after a hearing, this Court may consider granting relief from the restraints imposed herein in the event that it be deemed necessary, appropriate and warranted to so terminate, annul, modify or condition the injunctive relief granted herein.

5. The automatic stay under §362 of the Bankruptcy Code and as extended by this Order operates to stay the

continuation of pending matters only as against The Celotex Corporation and Carey Canada Inc. and does not operate to stay the continuation of such matters as against any other named defendant therein unless proceedings under the Bankruptcy Code have been commenced by or against such other named defendant.

DONE AND ORDERED at Tampa, Florida, on
October 17, 1990.

/s/ Thomas E. Baynes, Jr.
Thomas E. Baynes, Jr.
United States
Bankruptcy Judge

cc: Jeffrey W. Warren, Esq.
Lynne L. England, Esq.
Debtors

19g/plr/p-6

**In the Matter of the CELOTEX
CORPORATION, et al.,**

Debtors.

**Bankruptcy Nos. 90-10016-8B1,
90-10017-8B1.**

United States Bankruptcy Court,
M.D. Florida,
Tampa Division.

June 13, 1991.

Personal injury plaintiffs in asbestos litigation against Chapter 11 debtor moved to release supersedeas bonds. The Bankruptcy Court, Thomas E. Baynes, Jr., J., held that bonds were property of defendant's bankruptcy estate subject to automatic stay, and only available to personal injury plaintiffs, should their cases ultimately be affirmed on appeal, upon application to Bankruptcy Court.

Motion denied.

Jeffrey W. Warren, for debtor.

Ketchey, Horan, Hearn & Neukamm, for Asbestos plaintiffs.

Charles M. Tatelbaum, Johnson, Blakely, Pope, Bokor, Ruppel & Burns, for the Unsecured Trade Creditors Committee.

Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, for claimant Marion George and Others.

Baron & Budd, P.C., Gillenwater, Nichol & Ames, Kazan, McLain, Edises & Simon, Ness, Motley, Lodeholt, Richardson & Poole, Jaques Admiralty Law Firm,

Greitzer & Locks, for Asbestos-Related Personal Injury Creditors.

William Knight Zewadski, Trenam, Simmons, Kemker, Scharf, Barkin, Frye & O'Neill, for Unofficial Asbestos Health Claim Co-Defendants' Committee.

Kozyak, Tropin, Throckmorton & Humphreys, P.A., for the Asbestos Property Damage Claimants Committee.

Gillenwater, Nichol & Ames for Danny W. Berlin.

Verrill & Dana, Portland, Me., for The American Hospital Ass'n.

B. Mills Latham, for appellees.

**OMNIBUS ORDER ON MOTION TO LIFT STAY
WITH REGARD TO CELOTEX APPEALS AND
TO RELEASE SUPERSEDEAS BONDS
THEREON**

THOMAS E. BAYNES, Jr., Bankruptcy Judge.

THIS CAUSE came on for consideration upon the (1) Motion Challenging Jurisdiction of Court over Property of Non-Debtors, (2) Motion to Lift Stay with Regard to Celotex Appeals and to Release Supersedeas Bonds Thereon, and (3) related issues raised by the enormous litigation in this case. By Order entered January 10, 1991, the Court denied the Motion Challenging Jurisdiction of Court over Property of Non-Debtors and granted, in part, the Motion to Lift Stay with Regard to Celotex Appeals and to Release Supersedeas Bonds Thereon. Specifically, the Court lifted the stay to enable the pending appellate actions to proceed but did not lift the stay with respect to the supersedeas bonds which Debtor posted in order to

obtain stays pending appeals of the underlying litigations. One of the remaining issues is whether the supersedeas bonds posted by Debtor are property of the bankruptcy estate subject to the automatic stay and thus not available for payment to the asbestos-related bodily injury plaintiffs should their cases ultimately be affirmed on appeal. The Court finds such a determination to be a core proceeding. 28 U.S.C. § 157(b)(2)(A), (G), (O). *See also LTV Corp. v. Aetna Casualty and Surety Co. (In re Chateaugay Corp.)*, 116 B.R. 887 (Bankr.S.D.N.Y.1990); *Garrity v. Leffler (In re Neuman)*, 71 B.R. 567 (S.D.N.Y.1987).

The Court, having considered the Motions, the record, and the memoranda of law submitted by the interested parties,¹ finds:

¹ In the Order entered January 10, 1991, the Court directed Debtor and Movants (asbestos Plaintiffs represented by the law firm of Wellborn, Houston, Adkinson, Mann & Sadler) to file legal memoranda addressing the issue of whether the supersedeas bonds are property of the estate. In addition, the Unsecured Trade Creditors Committee and B. Mills Latham submitted legal memoranda on the status of the supersedeas bonds. The Unsecured Trade Creditors Committee felt compelled to set forth its views on the supersedeas bond issue since resolution of that issue will have a direct and material effect upon all creditors of the estate. Latham, on November 28, 1990, was ordered to show cause why he should not be held in contempt for seeking release of a supersedeas bond posted by Debtor to obtain a stay pending appeal in *Celotex Corp. v. Tate*, 797 S.W.2d 197 (Tex.App. - Corpus Christi 1990). At the hearing held December 11, 1990, on the order to show cause, the Court directed Latham to file a memorandum on the supersedeas bond issue.

In addition to the memoranda filed by Movants, Debtor, the Unsecured Trade Creditors Committee, and Latham, memoranda on the supersedeas bond issue were filed by Marion

The Celotex Corporation and Carey Canada Inc. (collectively referred to as "Debtor") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code (11 U.S.C.) on October 12, 1990. At the time the petition was filed, over 141,000 asbestos-related bodily injury lawsuits were pending against Debtor.² On that date over 100 appeals were pending in asbestos-related bodily injury cases in which Debtor and others were appealing adverse judgments. Three of those pending appeals are of particular interest to this case.

On April 3, 1989, the United States District Court for the Eastern District of Texas entered a judgment against Debtor in the total amount of \$2,593,625. *King v. Armstrong World Indus.*, No. M-85-44-CA. Debtor appealed this adverse judgment to the United States Court of Appeals for the Fifth Circuit.³ In order to stay execution of the judgment pending appeal, Debtor posted a supersedeas bond issue by Northbrook Property and Casualty

George, the Asbestos-Related Personal Injury Creditors, hospital members of the American Hospital Association, the Unofficial Asbestos Health Claim Co-Defendants Committee, the Asbestos Property Damage Claimants, Greitzer and Locks, and Danny W. Berlin.

² The Celotex Corporation is a major manufacturer of building and roofing products for residential and commercial use. Carey Canada Inc. had been a miner of raw chrysotile asbestos fibers. In addition to the pending asbestos-related bodily injury lawsuits, Debtor also has been a defendant in 310 asbestos-related property damage lawsuits.

³ The Court of Appeals has affirmed the judgment of the District Court. *King v. Armstrong World Indus.*, 906 F.2d 1022, reh'g denied, 914 F.2d 251 (5th Cir.1990), cert. denied, ___ U.S. ___, 111 S.Ct. 2236, 114 L.Ed.2d 478 (1991).

Insurance Company. The bond was executed on May 17, 1989, and approved by the District Court on May 26, 1989. Insurance procedures were used as collateral to secure the bond issued by Northbrook.

On November 1, 1989, the District Court for the Fourth Judicial District, Rusk County, Texas, entered a judgment against Debtor in the total amount of \$5,379,299.50. *Pool v. Fibreboard Corp.*, No. 86-363, and *Williams v. Fibreboard Corp.*, No. 88-08-293. The damage award was comprised of \$4,179,299.50 in compensatory damages⁴ and \$1,200,000 in punitive damages. Debtor appealed this adverse judgment to the Court of Appeals of Texas, Sixth Judicial District, Texarkana. In order to stay execution of the judgment pending appeal, Debtor posted two supersedeas bonds issued by National Union Fire Insurance Company of Pittsburgh, Pa. Each bond was executed on February 1, 1990. A combination of cash and insurance was used as collateral to secure each bond issued by National Union.

On January 22, 1990, the United States District Court for the Eastern District of Texas entered a judgment against Debtor in the total amount of \$6,417,625. *Glasscock v. Armstrong Cork Co.*, No. M-85-158-CA. Debtor appealed this adverse judgment to the United States Court of

⁴ Debtor's liability for compensatory damages was joint and several with four or five co-defendants. The jury determined Debtor's portion of the liability was either 15% or 25% depending upon the particular asbestos plaintiff. The trial court determined that each defendant have contribution and indemnity against each other defendant in accordance with the percentage findings of the jury.

Appeals for the Fifth Circuit. In order to stay execution of the judgment pending appeal, Debtor posted a supersedeas bond issued by National Union Fire Insurance Company of Pittsburgh, Pa. The bond was executed on February 5, 1990, and approved by the District Court on February 7, 1990. A combination of cash and insurance was used as collateral to secure the bond issued by National Union.

I.

The genesis of any review of whether a supersedeas bond is property of the estate is the pre-Code decision of the Court of Appeals for the Third Circuit in *Mid-Jersey National Bank v. Fidelity-Mortgage Investors*, 518 F.2d 640 (3d Cir.1975). From that opinion black letter law has been ascribed by some: as supersedeas bond is not property of the estate, thus the automatic stay pursuant to Section 362 of the Bankruptcy Code does not preclude the judgment creditor from going against the surety bond. See *W.W. Gay Mechanical Contractor v. Wharfside Two*, 545 So.2d 1348 (Fla.1989); *J.M. Beeson Co. v. Sartori*, 553 So.2d 180 (Fla. 4th DCA 1989).

From *Mid-Jersey* we learn a deposit of funds by the debtor with the Clerk of the Court in lieu of a supersedeas bond is *in custodia legis*. The Third Circuit in *Mid-Jersey* determined the debtor had a "contingent reversionary interest as a potential beneficiary of the trust" in that supersedeas bond. See also *Vescovo v. First State Bank (In re Vescovo)*, 125 B.R. 468, 471 (Bankr.W.D.Tex.1990). Such a characterization has interesting connotations as well as incongruities. First, basic property law would suggest a

reversionary interest is never contingent but is vested subject to divestment. Second, since the debtor, as appellant, may be successful on appeal, the debtor must be deemed under the *Mid-Jersey* theorem to be a potential beneficiary under the trust.⁵ In such light, an argument can be made that the debtor has a property interest in a supersedeas bond. Section 541(a)(1) of the Bankruptcy Code states "all legal or equitable interests of the debtor in property as of the commencement of the case" is property of the estate "wherever located and by whom-ever held." Third, if the debtor holds a future interest or an equitable interest as a beneficiary of a trust under *Mid-Jersey*, that interest must be property of the estate even if that interest is subject to divestment.⁶

Parenthetically, one must remember the dichotomy between the supersedeas bond and the surety agreement and collateral securing the bond when making this analysis. The latter two are property of the estate. Whether a debtor can reject or assume the surety agreement or avoid it and thus seek return of the collateral may be an issue solely between the debtor and its surety.⁷ The status of

⁵ Such a deposit is likened to a trust where the court is the trustee with the duty to determine the beneficiaries at the end of the appellate process. See *Gnidovec v. Alwan (In re Alwan Bros.)*, 105 B.R. 886 (Bankr.C.D.Ill.1989).

⁶ If some trust theory is to be used, this Court would suggest utilizing a resulting trust theory rather than making the debtor a beneficiary of some hypothetical trust.

⁷ While these matters may not add any greater status to the bond as property of the estate, they have been of concern to the reorganizational process. See *Kellogg v. Blue Quail Energy, Inc. (In*

the supersedeas bond is a distinct, but interconnected, issue.

This Court has reviewed *Mid-Jersey* and its progeny. The *Mid-Jersey* court, considering pre-Code law, did not have before it the expansive views established by Congress in Section 541 and Section 362 of the Bankruptcy Code. The other courts which have reviewed the issue of supersedeas bonds as property of the estate appear to have adopted the *Mid-Jersey* rubric without an analysis of the appellate process vis-a-vis the Bankruptcy Code. *Moran v. Johns-Manville Sales Corp.*, 28 B.R. 376, 377-378 (N.D.Ohio 1983); *Johns-Manville Corp. v. Asbestos Litigation Group (In re Johns-Manville Corp.)*, 26 B.R. 420, 433 (Bankr.S.D.N.Y.1983); *W.W. Gay Mechanical Contractor*, 545 So.2d at 1350; *J.M. Beeson Co.*, 553 So.2d at 181.

re Compton Corp.), 831 F.2d 586 (5th Cir. 1987); *In re Chateaugay Corp.*, 116 B.R. at 896-899.

Any inquiry into the status of the surety bond and any collateralization by the debtor may include:

1. The contract establishing the bond.
2. The characterization of the contract under bankruptcy or non-bankruptcy law.
3. The distribution of any collateral held as security for the bond.
4. The status of any security in the bankruptcy proceeding.

For the most part, these issues arise between the debtor and its surety when the bond is not court-affiliated such as a deposit with the clerk. It is this Court's opinion that whether the underlying bond is property of the estate is not predicated upon a determination that a judgment is a fraudulent transfer or the surety contract is executory.

II.

As to federal litigation, Rule 62(d) of the Federal Rules of Civil Procedure permits an appellant to stay execution of the judgment by posting a bond.⁸ Thus, the judgment creditor is protected by the supersedeas bond during the pendency of the appeal. See *Prudential Ins. Co. of Am. v. Boyd*, 781 F.2d 1494, 1498, *reh'g denied*, 788 F.2d 1570 (11th Cir.1986); see also *Avirgan v. Hull*, 125 F.R.D. 185 (S.D.Fla. 1989). Only when the appellate process is concluded is the judgment creditor able to take action against the bond and the surety.

The act of filing a petition in bankruptcy during the pendency of an appellate case does not alter the operation of Rule 62 of the Federal Rules of Civil Procedure nor allow the judgment creditor or its agents to proceed upon some perfervid, yet fallacious, belief that it is now open season on the supersedeas bond.⁹ By the filing of the petition, the automatic stay is activated and all proceedings against a debtor, including appellate proceedings, are stayed. 11 U.S.C. § 362(a)(1). See *O'Neill v. Continental Airlines (In re Continental Airlines)*, 928 F.2d 127 (5th

⁸ Most states provide similar protection to a judgment creditor. See, e.g., Fla.R.App.P. 9.310. See also Fed.R.Civ.P. 65.1; Bankruptcy Rule 9025.

⁹ Generally, it is in the best interest of the estate to lift the automatic stay to allow the appellate process to be completed. Once the decision of the appellate court is final, the status of the supersedeas bond as property of the estate can be ascertained. See *Atlantic Richfield Co. v. Good Hope Refineries*, 604 F.2d 865 (5th Cir. 1979). This Court has consistently granted relief from the stay to allow any pending asbestos-related bodily injury appeal to be concluded.

Cir.1991); *Balaber-Strauss v. Reichard (In re Tampa Chain Co.)*, 835 F.2d 54 (2d Cir.1987); *Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60 (6th Cir.1983), *cert. denied*, 478 U.S. 1021, 106 S.Ct. 3335, 92 L.Ed.2d 740 (1986). Moreover, any act to obtain possession of, or exercise control over, any property of the estate is stayed. 11 U.S.C. § 362(a)(3).

If at the time of filing the petition the appellate process has not been concluded, the debtor still has an interest in the supersedeas bond cognizable under Section 541 of the Bankruptcy Code subject to the interest being divested if the debtor is unsuccessful once the appellate process is completed. Fed.R.App.P. 41(a). See *Saper v. West*, 263 F.2d 422 (2d Cir.), *cert. denied*, 360 U.S. 916, 79 S.Ct. 1433, 3 L.Ed.2d 1532 (1959). This approach is correct, for otherwise all supersedeas bonds in place at the time of the filing of the petition in bankruptcy, notwithstanding the status of any appellate process, would be subject to attack by the judgment creditor as not being property of the estate. Continuing protection of the bond during the appeal is consistent with *Mid-Jersey*, 518 F.2d at 644. See also *Grubb v. Federal deposit Ins. Corp.*, 833 F.2d 222 (10th Cir.1987).

If such were not the case, the debtor, after a successful appeal, would have some new cognizable rights or property coming back from the release of the supersedeas bond now magically becoming property of the estate. If a reorganization plan had been confirmed by the time the appellate process was concluded, a debtor could claim these returning bond funds are not available to creditors. 11 U.S.C. § 1141(b). The Court of Appeals for the Seventh Circuit in *Sheldon v. Munford, Inc.*, 902 F.2d 7 (7th Cir.1990), clearly saw all these contingencies and their

attendant results when it denied a judgment creditor's attack on the debtor's supersedeas bond during the appellate process.

III.

Where a debtor, upon the filing of the bankruptcy petition, is an unsuccessful appellant in the total appellate process, or during the bankruptcy case is unsuccessful in its appeal, its property interest in the bond can be divested and any efforts by the debtor to prevent the judgment creditor from proceeding against the supersedeas bond must be sought under Section 105 of the Bankruptcy Code.

Upon Debtor's filing its bankruptcy petition, this Court entered an order pursuant to Section 105 which sought to augment the stay protection afforded by Section 362(a). Such order was upon Debtor's motion and was for the purpose of precluding, among other things, judgment creditors from proceeding in various state and federal courts against supersedeas bonds without first coming before this Court.¹⁰

¹⁰ While a few judgment creditors have proceeded against the supersedeas bonds without first coming before this Court, so far few have claimed this Court lacks authority to issue a Section 105 stay without Debtor's filing an adversary proceeding. While Bankruptcy Rule 7001 requires an adversary proceeding if a party is seeking an injunction, this Court believes the plain language of Section 105 allows this Court, *sua sponte*, to enter a stay order against any and all parties for specific or general purposes in order to ensure the integrity of the bankruptcy system and to protect the debtor in the initial stages of a reorganization proceeding. See *LTV Steel Co. v. Board of Educ. of*

The implementation of the Section 105 stay was required because of the complexity of Debtor's case. There are over 141,000 asbestos-related bodily injury cases pending against Debtor in almost every state and federal jurisdiction. There are over 100 asbestos-related bodily injury cases on appeal. Judgments totaling nearly 70 million dollars are being stayed by the supersedeas bonds posted by Debtor while the appellate processes proceed. All supersedeas bonds are secured by property of Debtor's estate.

Further, many of the pending asbestos-related bodily injury cases involve a number of co-defendants which are now in bankruptcy. Because of the automatic stay with respect to Debtor's and co-defendants' cases, various asbestos-related litigation throughout the United States has come to a halt. Similarly, the use of multi-district litigation procedures is not available. See Judicial Conference of the United States, Report of the Ad Hoc Committee on Asbestos Litigation (March 1991). In light of the fact 28 U.S.C. § 157 precludes this Court from liquidating the asbestos-related bodily injury cases, other than estimating claims for voting purposes, there is a potential this Court will be faced with thousands, perhaps tens of thousands, of motions to lift the stay to proceed in the various trial courts notwithstanding the fact 28 U.S.C. § 157(b)(5) does not provide an expeditious method of

the Cleveland City School Dist. (In re Chateaugay Corp.), 93 B.R. 26, 29 (S.D.N.Y.1988); *Findley v. Blinken (In re Joint E. and S. Dists. Asbestos Litig.)*, 120 B.R. 648, 658 (E. & S.D.N.Y.1990); *In re Larmar Estates, Inc.*, 5 B.R. 328 (Bankr.E.D.N.Y.1980). See also *In re Roberts*, 68 B.R. 1004 (Bankr.E.D.Mich.1987).

dealing with these asbestos-related bodily injury cases.¹¹ If there is potential peripheral personal injury litigation which will circumvent the review process of either the bankruptcy court or the district court and distort the reorganization process, then Section 105 must be used. See *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93 (2d Cir.), cert. denied, 488 U.S. 868, 109 S.Ct. 176, 102 L.Ed.2d 145 (1988).

At the time of filing its petition, Debtor had been engaged in continuous litigation relating to insurance coverage on asbestos-related injury claims. Debtor, asbestos litigation co-defendants and various insurance companies struck a pre-petition agreement which created a dispute resolution mechanism to facilitate claims settlements. The internal inability of this alternative dispute resolution system to proceed, coupled with other litigation over insurance coverage, has frustrated the tort litigation peripheral to this bankruptcy case. These factors complicate any procedures to deal with known asbestos claimants as well as those whose claims arose prior to the filing of the bankruptcy, but whose injuries have not yet manifested themselves. In light of the inability of the *Johns-Manville* trust to handle such potential claims, this

¹¹ The nexus between Section 362(a) and 28 U.S.C. § 157 is perfectly illustrated in Debtor's case. Section 362 stays all judicial action against Debtor. If litigants/creditors wish to proceed, they must seek relief from the stay in bankruptcy court. The bankruptcy court, pursuant to 28 U.S.C. § 157(b)(2)(B), cannot deal with personal injury claims and can only provide relief by allowing the litigants to proceed to district court where it, as gatekeeper over such claims, determines where they will be liquidated. 28 U.S.C. § 157(b)(5).

Court finds it abundantly necessary to stay any and all parties from proceeding against Debtor in any forum until a determination can be made of the efficacy of any remedy, claim, or assertion of jurisdiction. Failure to bring such stability to Debtor's case in its initial stages would place this bankruptcy case on the dangerous edge of things. *Erti v. Paine Webber Jackson and Curtis, Inc. (In re Baldwin-United Corp. Litig.)*, 765 F.2d 343, 349 (2d Cir.1985).

The federal courts of appeals, upon viewing injunctions granted during pandemic tort-bankruptcy cases such as this have consistently understood these circumstances and have endorsed the jurisdiction and utilization of a stay as a case management control mechanism. The Court of Appeals for the Second Circuit in the *Johns-Manville* bankruptcy acknowledged Section 105 as an authorized instrumentality to preclude actions which may "impede the reorganization process." *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89, 93 (2d Cir.), cert. denied, 488 U.S. 868, 109 S.Ct. 176, 102 L.Ed.2d 145 (1988). The Court of Appeals for the Fourth Circuit in *A.H. Robins* twice upheld the stay mechanism to thwart actions "which will have an adverse impact on the Debtor's ability to formulate a Chapter 11 plan." *A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994 (4th Cir.), cert. denied, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986); *Oberg v. Aetna Casualty and Surety Co. (In re A.H. Robins)*, 828 F.2d 1023 (4th Cir.1987), cert. denied, 485 U.S. 969, 108 S.Ct. 1246, 99 L.Ed.2d 444 (1988). In the latter decision, the Fourth Circuit clearly took the position that the bankruptcy court could stay litigation which would create a "substantial burden

on . . . [the debtor], detract[ing] from the reorganization process." *In re A.H. Robins*, 828 F.2d at 1026. In another asbestos case, the Court of Appeals for the Fifth Circuit affirmed the bankruptcy court's jurisdiction to use Section 105 to stay personal injury suits filed by asbestos workers against debtors, insurers, and executives. *In re Davis*, 730 F.2d 176 (5th Cir.1984).

These decisions reinforce fundamental bankruptcy policy to stop ongoing litigation and to prevent peripheral court decisions from dealing with issues, properties, or entities involved in a debtor's reorganization process without first allowing the bankruptcy court to have an opportunity to review the potential effect on the debtor. Where bankruptcy courts in "mega" cases such as this case are required to deal with complex litigation involving numerous parties, joint and several liability, and multi-million dollars in claims and assets, not to mention potential conflicts with other judicial determinations, the powers of the bankruptcy court under Section 105 must in the initial stage be absolute, unless limited by the Bankruptcy Code or other federal laws. Clearly, the role of Section 105 in this type of case is first to protect the reorganization process.

IV.

As to the utilization of Section 105 vis-a-vis the supersedeas bonds, once the judgment creditor has been successful throughout the appellate process the judgment creditor is not able to proceed against the supersedeas bond without seeking to vacate the Section 105 stay in this Court. Under these circumstances, it will be Debtor's

burden to establish that the Section 105 stay should continue. The Court's inquiry will include Debtor's ability to avoid any final judgment under the Bankruptcy Code and the necessity to protect its sureties or disenfranchise them if such surety agreements can be considered executory contracts or avoided under the avoiding powers in the Bankruptcy Code. (11 U.S.C. §§ 365, 547, and 548.) Additionally, consideration will be given to Debtor's ability to deal with the targeted litigation within the reorganization plan and the effect on that process if the Section 105 stay is extinguished. The analysis may also include the treatment of those judgments which included punitive damages¹² or joint and several liability or contribution with other asbestos co-defendants. This Court does not seek to establish an exhaustive list of inquiry, as each specter of the Section 105 stay may relate differently to an aspect of Debtor's reorganization process which seeks to be protected. At this juncture the Section 105 stay is more analogous to the protection of third parties as provided for in *A.H. Robins* and *Johns-Manville* than it is to some aberration as some would postulate.

¹² Section 726(a)(4) of the Bankruptcy Code provides that punitive damages are fourth in line for distribution in a Chapter 7 liquidation. Although Section 726(a)(4) is inapplicable to Chapter 11 reorganizations (*In re A.H. Robins Co.*, 89 B.R. 555, 560 (E.D.Va.1988); *In re Alwan Bros.*, 115 B.R. 148, 151 (Bankr.C.D.Ill.1990)), it is well-established that bankruptcy courts have inherent equitable power to disallow, limit, or subordinate claims for punitive damages in Chapter 11 reorganizations. *In re A.H. Robins Co.*, 89 B.R. at 562; *In re Apex Oil Co.*, 118 B.R. 683, 699 (Bankr.E.D.Mo.1990); *In re Johns-Manville Corp.*, 68 B.R. 618, 627 (Bankr.S.D.N.Y.1986), *aff'd*, 78 B.R. 407 (S.D.N.Y.1987).

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that:

1. The supersedeas bond is property of the estate as long as the appellate process upon which it is based is proceeding, and the automatic stay of Section 362 applies to any action to enforce a judgment against the supersedeas bond.

2. Where this Court has granted relief from the stay to complete the appellate proceedings involving Debtor and the appellate process has concluded in favor of the judgment creditor, that judgment creditor is precluded from proceeding against any supersedeas bond without first seeking to vacate the Section 105 stay in this Court.

3. Where at the time of filing the petition, the appellate process between Debtor and the judgment creditor had been concluded, the judgment creditor is precluded from proceeding against any supersedeas bond posted by Debtor without first seeking to vacate the Section 105 stay entered by this Court. It is further

ORDERED, ADJUDGED AND DECREED except as to this Court's orders granting relief from the automatic stay to complete the appellate process, Movants' Motion to Lift Stay with Regard to Celotex Appeals and to Release Supersedeas Bonds Thereon is denied. It is further

ORDERED, ADJUDGED AND DECREED the Section 105 stay entered by this Court on October 17, 1990, continues in effort.

DONE AND ORDERED.

**In the Matter of The CELOTEX
CORPORATION, et al.,**

Debtors.

**Bankruptcy Nos. 90-10016-8B1,
90-10017-8B1.**

United States Bankruptcy Court,
M.D. Florida,
Tampa Division.

May 29, 1992.

Judgment creditors moved for relief from § 105 stay in Chapter 11 case. The Bankruptcy Court, Thomas E. Baynes, Jr., J., held that § 105 stay would continue during pendency of debtor's formulation of Chapter 11 plan.

Motion denied.

Jeffrey W. Warren, Bush, Ross, Gardner, Warren & Rudy, P.A., Tampa, Fla., for Celotex Corp. et al.

Sara Kistler, Asst. U.S. Trustee.

John W. Kozyak, Kozyak Tropin Throckmorton & Humphreys, P.A., Miami, Fla., for Asbestos Property Damage Claimants Committee.

Charles M. Tatelbaum, Johnson, Blakely, Pope, Boker, Ruppel & Burns, P.A., Tampa, Fla., for Creditors Committee of Unsecured Creditors.

William Knight Zewadski, Trenam, Simmons, Kemker, Scharf, Barkin, Frye & O'Neill, Tampa, Fla., for Unofficial Asbestos Health Claim Co-Defendants Committee.

M. Elizabeth Wall, Honigman Miller Schwartz and Cohn, Tampa, Fla., for Asbestos Health Claimants Committee.

Alani Golanski, New York City, for Angelina O'Brien.

Raymond C. Farfante, Jr., Tampa, Fla., Melvin I. Friedman, New York City, for Mary McCorry and Sylvonia Stridiron.

Rex Houston, Henderson, Tex., Randy Fabel, for "The King Group" Lloyd and Louan King, et al.

Thomas A. Sweeny, Kansas City, Mo., for William A. Angotti and Isabella Angotti.

Stephen J. Kiely, Salem, Mass., for Mary Gambacorta.

H. Douglas Nichol, Paul T. Gillenwater, Knoxville, Tenn., for Danny Wilburn Berlin.

Joseph D. Shein, Philadelphia, Pa., Suzanne Reilly, for Charles and Julia Rose.

James H. Rion, Jr., Columbia, S.C., J. Michael Papan-tonio, Pensacola, Fla., for Gordon L. House and Gladys House.

Michael A. Patrick, for Estate of Mark Thomas Hynes.

ORDER ON MOTIONS FOR RELIEF
FROM SECTION 105 STAY

THOMAS E. BAYNES, Jr., Bankruptcy Judge.

THIS CAUSE came on for final evidentiary hearing upon several Motions for Relief from the Section 105

Stay.¹ Debtor filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code (11 U.S.C.) on October 12, 1990. Debtor is a manufacturer of building products. Through the course of merger with, and acquisition of, other corporations, Debtor has been involved in a multitude of lawsuits alleging damage caused by asbestos products sold by it or its predecessors. Prior to filing bankruptcy, Debtor had become the judgment debtor in over 100 asbestos lawsuits² and had posted various supersedeas bonds to stay collection of these judgments pending appeals. These bonds were collateralized by millions of dollars of Debtor's property.

Upon the filing of the bankruptcy case, this Court was presented the issue of whether, during the pendency of the asbestos appeals, the supersedeas bonds are property of Debtor's estate. On October 17, 1990, in the initial stages of this case, this Court entered an Order Granting Emergency Motion for Determination of Applicability of § 362 Stay to Pending Matters or, in the Alternative, for

¹ Motions seeking relief from the Section 105 stay filed by Mary McCorry and Sylvonia Stridiron; Lloyd and Louan King, et al.; Danny Wilburn Berlin; Angelina O'Brien; William A. and Isabella Angotti; Mary Gambacorta; Gordon L. and Gladys House; the Estate of Mark Thomas Hynes; and Charles and Julia Rose were heard on October 14, 1991, and March 13 and April 25, 1992.

² At the time of filing the bankruptcy case, there were over 141,000 lawsuits pending against Debtor and other defendants involving asbestos-related bodily injury claims, asbestos-related property damage claims, and environmental claims. Pre-petition Debtor or its insurers had paid out over \$361,000,000 to asbestos-related bodily injury claimants.

Extension of § 362 Stay to Pending Matters, which established a Section 105 stay prohibiting all entities from, *inter alia*, proceeding against Debtor or property of Debtor's estate or enforcing against Debtor or property of Debtor's estate any judgment obtained against Debtor. On June 13, 1991, this Court determined the supersedeas bonds were property of Debtor's estate as long as the appellate process for which each bond was posted had not concluded. *In re Celotex Corp.*, 128 B.R. 478 (Bankr.M.D.Fla.1991). See also *Borman v. Raymark Indus.*, 946 F.2d 1031 (3d Cir.1991). If the judgment creditor prevails on appeal, the supersedeas bond would no longer be property of the estate, but would be protected by the Section 105 stay. See *Carter Baron Drilling v. Excel Energy Corp.*, 76 B.R. 172 (D.Colo.1987). At that stage, any judgment creditor wishing to proceed against the supersedeas bond must seek relief from the Section 105 stay. Debtor bears the burden of establishing the Section 105 stay should continue.

The Court's inquiry into whether the Section 105 stay should continue includes, *inter alia*, Debtor's ability to avoid any final judgment under the Bankruptcy Code, the necessity of protecting or disenfranchising Debtor's sureties, Debtor's ability to deal with the asbestos litigation within the reorganization plan and the effect on that process if the Section 105 stay were to be lifted, the treatment of the punitive damage portion of any judgment and the treatment of joint and several liability, contribution, and indemnification from co-defendants in other litigation. *In re Celotex Corp.*, 128 B.R. at 484.

At the hearings Debtor submitted into evidence copies of all insurance policies covering products liability

actions based upon asbestos exposure, copies of settlement agreements between Debtor and various insurers, copies of most of the supersedeas bonds posted by Debtor pre-petition, copies of Movants' final judgments, copies of agreements between Debtor and the bonding companies, and copies of various financial data relating to Debtor.

A party seeking injunctive relief must generally establish (A) likelihood of success on the merits, (B) irreparable harm, (C) threatened harm outweighs possible harm to enjoined party, and (D) minimal harm to the public interest. *Snook v. Trust Co. of Georgia Bank, N.A.*, 909 F.2d 480, 483 (11th Cir.1990). Viewing the continuance of the Section 105 stay under the criteria for obtaining an injunction, the analysis takes the following form:

A. Likelihood of Debtor's success on the merits: Debtor's likelihood of success on the merits should be measured not by Debtor's ability to avoid or subordinate the claims of the judgment creditors or by Debtor's ability to obtain confirmation of a plan, but rather by Debtor's ability to preserve the estate while simultaneously protecting or avoiding the claims of the judgment creditors. This criterion requires Debtor to proceed in a timely fashion to avoid or subordinate the claims of the judgment creditors, formulate a plan of reorganization, and provide adequate protection for those judgment creditors protected by supersedeas bonds. It is clear Debtor has the ability to proceed in such a fashion.

B. Irreparable harm to Debtor: Debtor, in all instances, has collateralized the supersedeas bonds. The

collateral has taken various forms, but one type in particular is illustrative of the linkage associated with irreparable harm. Debtor and many of its insurers on asbestos claims have settled long-ongoing disputes over insurance coverage. Some of these settlement agreements established the maximum amount of insurance coverage, provided for payment to Debtor of these coverage amounts over time, and provided such payments and contract rights could be held by the insurance company as collateral for supersedeas bonds issued on behalf of Debtor in some of the asbestos cases. The supersedeas bonds posted in the *House* and *Hynes* cases fall into this category.

Dissolving the Section 105 stay would merely shift the battleground: if the Section 105 stay were lifted to enable the judgment creditors to reach the sureties, the sureties in turn would seek to lift the Section 105 stay to reach Debtor's collateral, with corresponding actions by Debtor to preserve its rights under the settlement agreements. Such a scenario could completely destroy any chance of resolving the prolonged insurance coverage disputes currently being adjudicated in this Court. The settlement of the insurance coverage disputes with all of Debtor's insurers may well be the linchpin of Debtor's formulation of a feasible plan.³ Absent the confirmation of a feasible plan, Debtor may be liquidated or cease to

³ Debtor has brought an adversary proceeding against numerous insurance companies and underwriting syndicates seeking a declaratory judgment concerning the interpretation of the insurance policies and the existence and extent of coverage under those policies for asbestos-related claims and environmental claims asserted against Debtor. *Celotex Corp. v. All Insurance Co.* (Adv. No. 91-40).

exist after a carrion feast by the victors in a race to the courthouse.

C. Threatened harm to Debtor outweighs any possible harm to judgment creditors: Movants are correct in their characterization of this dispute as a matter of risk distribution. All things being equal, they say, the risk should be placed on Debtor and its sureties. These judgment creditors have been successful through the completed appellate process and, in a non-bankruptcy context, would be entitled to have their judgments satisfied. Within the bankruptcy context, however, any possible harm to the judgment creditors can be minimized through the establishment of an adequate protection mechanism.

D. Minimal harm to the public interest: There are probably hundreds of thousands of people who have asbestos-related injuries who, but for timing, would have attained the status of judgment creditors protected by supersedeas bonds.⁴ If Debtor is not free to formulate a feasible plan, these potential claimants, known or unknown, will be left with little or no recourse.

There are those who went before us. There were feasible plans, applauded by many, and approved by knowledgeable adjudicators. Such have fallen on troubled times. Their feet of clay have been exposed, and like

⁴ This group includes any litigant who has not yet obtained a determination upon the merits of his case as well as any person who may have suffered an asbestos-related injury which has not yet manifested itself. Debtor estimates at least 100,000 to 150,000 pre-petition claimants. In addition, consideration for asbestos property damage claims cannot be overlooked.

Ozymandias,⁵ their plans may leave little to be observed. With knowledge of the Johns-Manville reorganization⁶ and the complexities associated with the A.H. Robins confirmed plan⁷, this Court will not put forces into motion which may foster an apocalypse when other timely methods can protect all parties until Debtor's plan can be evaluated by all classes. It is this Court's perception this is why none of the committees in this case have taken up Movants' cause.

Moreover, those sureties protected by the Section 105 stay have yet to exhaust the benefits accruing from their settlement agreements with Debtor. They must participate in the protection of the judgment creditors. Many of them, through their agreements, are obligated to pay Debtor amounts equal to the agreed insurance coverage. Admittedly, the sureties may hold those amounts as secured creditors or may have rights of setoff or recoupment. Nonetheless, their rights may be subject to avoidance, subordination, rejection or modification through the bankruptcy process. They, too, recognize that just the inquiry into such matters along with the dissolution of

⁵ Percy Bysshe Shelley, *Ozymandias* (1818).

⁶ See *Findley v. Blinken* (In re Joint E. and S. Dists. Asbestos Litig.), 120 B.R. 648 (E. & S.D.N.Y.1990); *Findley v. Blinken* (In re Joint E. and S. Dists. Asbestos Litig.), 129 B.R. 710 (E. & S.D.N.Y.1991).

⁷ See *Menard-Sanford v. Mabey* (In re A.H. Robins Co.), 880 F.2d 694 (4th Cir.), cert. denied, 493 U.S. 959, 110 S.Ct. 376, 107 L.Ed.2d 362 (1989); *Blum v. Unnamed Claimants* (In re A.H. Robins Co.), 880 F.2d 779 (4th Cir.1989).

the Section 105 stay could transform this case into another *Jarndyce v. Jarndyce*.⁸

Asceticism rather than prophecy should normally be the shibboleth of most matters in bankruptcy. If this Court believed its decision-making were anyway close to a Procrustean solution, it would stop here. However, it is clear the dour countenance of irreparable harm appears before us and portends a resolution which in itself serves the public interest.

Considering the evidence, the record, and the argument of counsel, this Court finds there is sufficient evidence to support the continuation of the Section 105 stay. This determination is predicated upon several factors. First, if the Section 105 stay were terminated, there would be an avalanche of litigation by various bond sureties seeking to proceed against Debtor's collateral supporting those supersedeas bonds because the judgment creditors would be free to go against those bonds. This Court would be faced with the same complex scenario of balancing the interests of Debtor's survival in bankruptcy and the protection of the property of the estate vis-a-vis the rights of the bond sureties. This balance can be struck more equitably by protecting the judgment creditors at the same level as when the bankruptcy was filed. Continuation of the Section 105 stay benefits not only debtor but all creditors, including numerous asbestos claimants who have not yet obtained judgments. The judgment creditors' claims are capable of being considered within the Chapter 11 plan. A Chapter 11 plan may be able to alter the

⁸ Charles Dickens, *Bleak House* (1853).

immediate collection rights of the bond sureties, thus preserving the collateral for other, as yet unknown, creditors. Such an alteration of interests may be acceptable to many sureties who are also involved as Debtor's insurers on asbestos claims.

Second, the judgment creditors, while having unique status within a bankruptcy context, are not impaired where their positions during the bankruptcy case are not eroded and their treatment under the plan provides for a separate classification of their claims. It would appear these judgment creditors' claims would be allowed secured claims upon the completion of the appellate process, especially since this Court does not have jurisdiction to consider any objections to their claims unless liquidated. Once the claims are liquidated, any court may, *inter alia*, be limited by the doctrine of issue or claims preclusion.⁹ Avoidance or subordination of Movants' rights appear to be the only potential avenues for Debtor.¹⁰

Third, consideration must be given to the numerous other asbestos claimants who do not have the advantage of having judgments or supersedeas bonds to protect their claims during the bankruptcy. This potentially large number of known and unknown asbestos claimants will

⁹ See, e.g., *In re Standard Insulations, Inc.*, 138 B.R. 947 (Bankr.W.D.Mo.1992).

¹⁰ See, e.g., *Novak v. Callahan (In re GAC Corp.)*, 681 F.2d 1295 (11th Cir.1982); *In re A.H. Robins Co.*, 89 B.R. 555 (E.D.Va.1988); *In re Apex Oil Co.*, 118 B.R. 683 (Bankr.E.D.Mo.1990); *In re Johns-Manville Corp.*, 68 B.R. 618 (Bankr.S.D.N.Y.1986), *aff'd*, 78 B.R. 407 (S.D.N.Y.1987).

have to be dealt with by Debtor in its plan. The history of similar bankruptcy cases and their proposed solutions to these problems has acquainted us with the uncertainty of those solutions. This Debtor, like any other similarly situated debtor, cannot afford any inappropriate resolution of such claims. Debtor's quest to formulate a comprehensive, durable solution will best be conducted in an environment unfettered by multiple attacks on its collateral or successive disputes presented to this Court for resolution. Such protection, however, requires Debtor to give adequate protection to the judgment creditors.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Motions for Relief from the Section 105 Stay are denied on the following conditions:

1. Within 30 days of the entry of this Order, Debtor shall provide the Court with a report listing all judgment creditors protected by supersedeas bonds, the amount of each judgment, the amount of each supersedeas bond, the surety for each bond, and the collateral for each bond.

2. Debtor shall set out in the report whether any supersedeas bond protecting any judgment was insufficient, as of the date of filing the petition, to cover the judgment amount and interest allowed by law.

3. If any supersedeas bond is insufficient or will become insufficient to protect completely any judgment affirmed on appeal through confirmation of the plan, Debtor, within 30 days of filing the report, shall create an interest-bearing reserve account or increase the face amount of any supersedeas bond to cover the full amount

of any judgment through confirmation. Such reserve account, if established, shall be disbursed only upon order of this Court.

4. Notwithstanding Debtor's obligation, any surety of Debtor whose collateral is capable of bearing interest shall establish an escrow account which bears interest at the highest prevailing rate allowed by law. In no case, however, shall the supersedeas bond, or subsequent protection under this Order, be less than the amount of the judgment plus interest. The Court reserves jurisdiction to determine whether the interest accruing in the escrow account shall be for the benefit of the judgment creditors, the surety, or Debtor. No funds shall be disbursed from such escrow account without order of this Court.

5. Debtor shall classify any claim of judgment creditors whose judgments are protected by supersedeas bonds in a separate class in its Chapter 11 plan. Notwithstanding the classification, Debtor shall provide for such creditors' allowed claims to be paid in full unless otherwise agreed by the judgment creditor, individually, or determined by this Court. It is further

ORDERED, ADJUDGED AND DECREED that Debtor shall file any preference action or any fraudulent transfer action or any other action to avoid or subordinate any judgment creditor's claim against any judgment creditor or against any surety on any supersedeas bond within 60 days of the entry of this Order

DONE AND ORDERED.

Daniel A. WILLIS; Carolyn W. Willis; Herman L. Mensing, Jr.; Frances K. Mensing; Vincent H. Lewis; Ruby B. Lewis; Elwood F. Hamlet; Lois D. Hamlet, Plaintiffs-Appellees,

and

Richard L. Taylor; Mary S. Taylor; William F. Cobb; Lillie P. Cobb; Roy B. Bass; Susan R. Bass, Plaintiffs,

v.

**The CELOTEX CORPORATION,
Defendant-Appellant,**

and

Owens-Corning Fiberglass Corporation; Eagle-Picher Industries, Inc.; Armstrong World Industries, Inc.; Gaf Corporation; Keene Corporation; Standard Insulations, Inc.; Raymark Industries, Inc.; Owens-Illinois, Inc.; H.K. Porter Company, Inc.; Fibreboard Corporation; Crown Cork & Seal Company, Inc.; Combustion Engineering, Inc.; Pittsburgh Corning Corporation, Defendants.

No. 91-1446.

**United States Court of Appeals,
Fourth Circuit.**

Argued Oct. 28, 1991.

Decided Oct. 22, 1992.

Creditors who obtained prepetition judgment for asbestos-related injuries moved for release of supersedeas bond posted pending appeal. The United States District Court for the Eastern District of Virginia, John A.

MacKenzie, Senior District Judge, granted motion, rejecting Chapter 11 debtor's claim that bond was part of estate. On rehearing, the Court of Appeals, Wilkins, Circuit Judge, held that bankruptcy court had authority to enjoin execution on supersedeas bonds posted to secure asbestos-related judgments against debtor.

Vacated and remanded.

Jeffrey Wayne Warren, Bush, Ross, Gardner, Warren & Rudy, P.A., Tampa, Fla., argued (Wendy V.E. England, on brief), for defendant-appellant.

Brent Marcus Rosenthal, Baron & Budd, P.C., Dallas, Tex., argued (Jonathan A. Smith-George, Patten, Wornom & Watkins, Newport News, Va., on brief), for plaintiffs-appellees.

Before RUSSELL and WILKINS, Circuit Judges, and WARD, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

OPINION

WILKINS, Circuit Judge:

The Celotex Corporation (Celotex) appeals an order of the district court directing The Aetna Casualty & Surety Company (Aetna) to perform as surety on a supersedeas bond posted by Celotex to secure, pending appeal, the payment of judgments entered by the district court against Celotex following a jury verdict in favor of the plaintiffs (Willis). Celotex maintains that the district court erred in permitting execution against Aetna because proceedings to enforce payment against the surety on the

bond were stayed following Celotex's Chapter 11 bankruptcy filing under the automatic stay provisions of 11 U.S.C.A. § 362(a)(1), (3) (West Supp.1992) or, alternatively, under an order of the United States Bankruptcy Court for the Middle District of Florida entered in Celotex's bankruptcy proceedings pursuant to 11 U.S.C.A. § 105(a) (West Supp.1992). The extraordinary facts presented by the Celotex bankruptcy lead us to conclude that the stay of proceedings against third-party sureties to enforce payment on supersedeas bonds by the bankruptcy court was a proper exercise of its authority under § 105(a). Consequently, we vacate the order of the district court and remand for further proceedings at such time as the bankruptcy court lifts the stay.

I.

In February 1989, the United States District Court for the Eastern District of Virginia entered amended judgments totalling \$526,500 in favor of Willis and against Celotex for Willis' asbestos-related injuries. Celotex posted a supersedeas bond in the amount of \$600,000, with Aetna serving as surety on the bond, to stay execution of the judgments pending Celotex's appeal.¹ See Fed.R.Civ. 62(d). To obtain Aetna's participation as surety, Celotex purchased certificates of deposit that it pledged to First Florida Bank, N.A. The bank then issued

¹ At oral argument we requested information concerning the structure of the financial arrangements between Celotex and Aetna. Willis subsequently moved to strike Celotex's response to our request. This motion is denied.

an irrevocable letter of credit² in favor of Aetna upon which Aetna could draw in the event it was required to pay on the supersedeas bond.³

This court affirmed the judgments against Celotex in June 1990, and our mandate issued on October 3, 1990. Nine days later Celotex and its wholly-owned subsidiary filed petitions for relief under Chapter 11 of the Bankruptcy Code, see 11 U.S.C.A. § 1101, *et seq.* (West 1979 & Supp.1992), in the United States Bankruptcy Court for the Middle District of Florida. On October 17, 1990, the bankruptcy court entered an order seeking to augment the automatic stay protection afforded to Celotex under § 362(a) and "precluding, among other things, judgment creditors from proceeding in various state and federal courts against supersedeas bonds" posted by Celotex

² This financial arrangement appears to be relatively common. See, e.g., *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 786 F.2d 794, 800-03 (7th Cir.1986) (Easterbrook, J., concurring); see generally *Cargill, Inc. v. Sunlight Foods, Inc.*, 586 So.2d 366, 367-68 (Fla. Dist. Ct. App. 1991).

³ If Aetna were to satisfy Willis' judgments, it could not do so with Celotex's assets because it does not hold Celotex's assets. Instead, it would compensate Willis with its own funds, then immediately draw on the irrevocable letter of credit. Section 362 would not stay Aetna from proceeding against the letter of credit. The letter of credit issued by the bank and its proceeds are not part of Celotex's bankruptcy estate, and the obligation of the bank under the irrevocable letter of credit is completely independent of any obligations between Aetna and Celotex. See *Southmark Corp. v. Riddle (In re Southmark Corp.)*, 138 B.R. 820, 828 (Bankr. N.D. Tex. 1992); *Kellogg v. Blue Quail Energy, Inc. (In re Compton Corp.)*, 831 F.2d 586, 589-90 (1987), *reh'g on other grounds*, 835 F.2d 584 (5th Cir. 1988); *In re M.J. Sales & Distrib. Co.*, 25 B.R. 608, 614 (Bankr. S.D. N.Y. 1982).

without the approval of the bankruptcy court. *In re Celotex Corp.*, 128 B.R. 478, 482 (Bankr. M.D. Fla. 1991).

On October 26, 1990, Willis informed the district court that Celotex had not paid the judgments and sought to execute against Aetna as surety on the supersedeas bond. See Fed. R. Civ. P. 65.1. Relying primarily upon *Mid-Jersey Nat'l Bank v. Fidelity-Mortgage Investors*, 518 F.2d 640, 643-44 (3d Cir. 1975), the district court determined that the supersedeas bond was not part of the Celotex bankruptcy estate over which the bankruptcy court possessed exclusive jurisdiction and, consequently, ordered the proceeds of the supersedeas bond disbursed to Willis. Celotex appeals this decision.

II.

Celotex contends that 11 U.S.C.A. § 362(a)(1) and (3)⁴ stayed proceedings against Aetna because it has an identity of interest with Celotex such that a proceeding against Aetna is, in effect, a proceeding against Celotex,

⁴ This section provides in pertinent part:
[A] petition filed under [Chapter 11] . . . operates as a stay, applicable to all entities, of - (1) the commencement or continuation . . . of a judicial . . . proceeding against the debtor that was . . . commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

. . . .
(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

11 U.S.C.A. § 362(a)(1), (3).

see *A.H. Robins Co. v. Piccinin* (*In re A.H. Robins Co.*), 788 F.2d 994, 999-1002 (4th Cir.), cert. denied, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986), and because the supersedeas bond is an asset of the bankruptcy estate. These arguments lack merit.

The terms of the supersedeas bond impose a duty on Aetna separate from and independent of Celotex's duty to pay the judgments. Aetna does not hold an identity of interest with Celotex. See *Washburn & Kemp, PC v. Committee of Dalkon Shield Claimants* (*In re A.H. Robins Co.*), 846 F.2d 267, 271 (4th Cir.1988) (distinguishing *Piccinin* and holding that unique circumstances essential to make a § 362(a) stay effective as to a third party do not exist if outsider third party owes independent contractual duty to creditor). Proceedings against Aetna as surety on the supersedeas bond, therefore, were not stayed under § 362(a)(1).

This court has not previously addressed whether a supersedeas bond is an asset of the bankruptcy estate. While there is considerable disagreement concerning this issue, see *In re Southmark Corp.*, 138 B.R. at 827-28; compare *Mid-Jersey Nat'l Bank*, 518 F.2d at 643-44 with *Borman v. Raymark Indus., Inc.*, 946 F.2d 1031, 1032-36 (3d Cir.1991), we need not address this question. Assuming a supersedeas bond is an asset of the bankruptcy estate during the pendency of an appeal, here the appeal was decided unfavorably to Celotex and our mandate issued prior to Celotex's bankruptcy filing, thus extinguishing any interest Celotex may have had in the bond. Accordingly, proceedings against the bond were not proceedings "to obtain possession of property of the estate" and were not stayed by § 362(a)(3). 11 U.S.C.A. § 362(a)(3).

III.

Next we consider whether the order of the bankruptcy court properly stayed execution against the surety of the supersedeas bond pursuant to 11 U.S.C.A. § 105(a). This section permits the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C.A. § 105(a). We have held that a bankruptcy court may properly exercise its authority under § 105(a) to enjoin an action against a third party when the court finds " 'that failure to enjoin would effect [sic] the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through the third party.' " *Piccinin*, 788 F.2d at 1003 (quoting *Otero Mills, Inc. v. Security Bank & Trust* (*In re Otero Mills, Inc.*), 25 B.R. 1018, 1020 (D.N.M. 1982)). Additionally, the bankruptcy court may " 'enjoin a variety of proceedings . . . which will have an adverse impact on the Debtor's ability to formulate a Chapter 11 plan.' " *Id.* (quoting *Johns-Manville Corp. v. Asbestos Litigation Group* (*In re Johns-Manville Corp.*), 40 B.R. 219, 226 (S.D.N.Y.1984)).

In support of the § 105(a) order, the bankruptcy court detailed the magnitude of the task it faced in attempting to oversee the bankruptcy proceedings, resulting from the sheer number of pending personal injury cases in which supersedeas bonds had been posted. *In re Celotex Corp.*, 128 B.R. 478, 482-83 (Bankr.M.D.Fla.1991). As of the bankruptcy filing, over 141,000 asbestos-related personal injury actions were pending against Celotex in federal and state jurisdictions nationwide; because at least 100 such cases were then on appeal, Celotex had posted supersedeas bonds totalling nearly \$70 million to stay

execution of the judgments pending conclusion of the appellate processes. *Id.* Stressing that its power in the initial stages of the bankruptcy filing to deal with this complex litigation must be absolute, and noting that an opportunity to evaluate the underlying tort judgments secured by the supersedeas bonds to ascertain whether any portion of the judgments were voidable would be required, the bankruptcy court concluded that a race to the courthouse by those insured by supersedeas bonds would impose a burden on the reorganization process. *Id.* at 483-84. The court made clear, however, that once a judgment creditor had successfully completed the appellate process, the propriety of lifting the stay of proceedings against the supersedeas bonds would be reexamined. *Id.* at 484.⁵

While in the usual bankruptcy filing, third-party payments on a supersedeas bond securing a judgment owed by the bankrupt would not affect reorganization, Celotex's is not the usual bankruptcy. We agree with the bankruptcy court that immediate execution against sureties on the supersedeas bonds would have been detrimental to Celotex's ability to formulate a plan of reorganization. A hiatus from execution on the bonds was necessary to permit the bankruptcy court to take control of the immense litigation and to examine the underlying tort judgments to establish whether any portion of the awards was voidable. Consequently, the bankruptcy

⁵ Because Willis has already successfully completed the appellate process, we assume that once the bankruptcy court has had an opportunity to evaluate whether any portion of Willis' judgment is voidable, it will lift the stay.

court did not act improperly in enjoining execution on supersedeas bonds posted to secure judgments against Celotex under § 105(a). Thus, we vacate the order of the district court and remand for further proceedings at such time as the bankruptcy court lifts the § 105(a) stay.

VACATED AND REMANDED.

APR 25 1994

In The
Supreme Court of the United States

October Term, 1993

No. 93-1504

THE CELOTEX CORPORATION,

Petitioner,

v.

BENNIE EDWARDS AND JOANN EDWARDS,

Respondents.

No. 93-1563

NORTHBROOK PROPERTY AND CASUALTY
INSURANCE COMPANY,

Petitioner,

v.

BENNIE EDWARDS AND JOANN EDWARDS,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Rule 65.1 of the Federal Rules of Civil Procedure allows enforcement of a supersedeas bond, posted to stay execution of judgment against a defendant that filed for reorganization after the judgment became final, against the non-bankrupt surety that issued the bond, even though a bankruptcy court in another circuit has attempted to restrain execution on supersedeas bonds posted in favor of the debtor under section 105(a) of the Bankruptcy Code.

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STATUTES AND RULES

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11 U.S.C. § 362(a)	3
Fed.R.Civ.P. 62(d).....	1, 2, 10
Fed.R.Civ.P. 65.1	1, 2, 10

STATUTES AND RULES INVOLVED

11 U.S.C. § 105(a) provides, in pertinent part,

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

Rule 62(d) of the Federal Rules of Civil Procedure provides,

Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Rule 65.1 of the Federal Rules of Civil Procedure provides, in pertinent part,

Whenever these rules . . . require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served. The surety's liability may be enforced on motion without the necessity of an independent action.

STATEMENT OF THE CASE

More than five years ago, a federal jury in Wichita Falls, Texas found that Petitioner The Celotex Corporation ("Celotex") tortiously caused Respondent Bennie Edwards to sustain serious personal injuries, and awarded Bennie Edwards and his wife Joanne compensatory and punitive damages. The United States District Court for the Northern District of Texas entered judgment on the jury's verdict on April 17, 1989. To stay immediate execution of the judgment pending appeal, Celotex posted a supersedeas bond executed by Petitioner Northbrook Property and Casualty Insurance Company ("Northbrook") pursuant to Rule 62(d) of the Federal Rules of Civil Procedure. The terms of the bond require Northbrook to pay the judgment, plus specified interest, if the judgment is affirmed and Celotex does not pay it. The district court approved the bond on June 6, 1989. Some fifteen months later, the Fifth Circuit affirmed the judgment. *Edwards v. Armstrong World Industries, Inc.*, 911 F.2d 1151 (5th Cir. 1990). The Fifth Circuit's mandate, making the judgment final and enforceable, issued October 12, 1990. That same day, Celotex filed a petition for reorganization in the United States Bankruptcy Court for the Middle District of Tampa.

On May 3, 1991, the Edwards filed a motion to enforce the terms of the supersedeas bond against Northbrook in the United States District Court for the Northern District of Texas pursuant to Rule 65.1 of the Federal Rules of Civil Procedure. In their motion, the Edwards sought recovery only from Northbrook; they did not seek any recovery from Celotex or from Celotex's property. Celotex nevertheless opposed the motion, arguing that

the Edwards' motion was a "proceeding against the debtor" and sought "property of the [debtor's] estate" in violation of the automatic bankruptcy stay, 11 U.S.C. § 362(a). Celotex also pointed out that five days after its bankruptcy filing, the bankruptcy judge, exercising the "equitable powers" conferred on him by section 105(a) of the Bankruptcy Code, "extended" the automatic stay by enjoining all proceedings "involving" Celotex, even those in which "a supersedeas bond has been posted." Celotex App. 28; Northbrook App. 35. Northbrook also opposed the Edwards' motion, urging the same arguments as those advanced by Celotex. Neither Celotex nor Northbrook contended that the conditions for triggering Northbrook's obligation under the bond had not been satisfied.

The Edwards contended that the automatic stay did not prevent the district court from granting their motion to enforce Northbrook's obligation under the supersedeas bond, because the motion neither sought relief from Celotex nor sought possession of any property of Celotex. The Edwards also argued that the bankruptcy court in Florida had no jurisdiction or power to enjoin enforcement of the terms of a supersedeas bond against Northbrook, since Celotex had no property interest in the bond. The district court agreed with the Edwards, and ordered that the Edwards could execute on the bond. Celotex, but not Northbrook,¹ appealed the order allowing execution on the bond to the Fifth Circuit.

¹ Respondents oppose the petition of Northbrook Property and Casualty Insurance Company for leave to intervene as a party for the purpose of filing its own petition for certiorari. It is true that by affirming the order of the district court allowing

The Fifth Circuit affirmed in a published opinion. *Edwards v. Armstrong World Industries, Inc.*, 6 F.3d 312 (5th Cir. 1993). Citing the opinion of the Fourth Circuit in *Willis v. Celotex Corp.*, 978 F.2d 146 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 1846 (1993) and the bankruptcy court's own opinion in *In re Celotex Corp.*, 128 B.R. 478 (Bankr.M.D.Fla. 1991), the Fifth Circuit found that the Edwards' motion did not implicate property in which Celotex had an interest, and thus rejected Celotex's contention that the bankruptcy court had exclusive jurisdiction over claims involving the bond. 6 F.3d at 315; Celotex App. 6-8; Northbrook App. 5-6. Because Celotex's property was not involved in the Edwards execution attempts, the Fifth Circuit found that the automatic stay did not prevent enforcement of the bond obligation against Northbrook. 6 F.3d at 315; Celotex App. 6-8; Northbrook App. 5-6.

Respondents to execute on a supersedeas bond against Northbrook, the judgment of the court of appeals directly affects Northbrook. However, Northbrook did not appeal the order of the district court or attempt to participate as a party in the court of appeals, apparently believing that Celotex would adequately represent its interests on appeal. Northbrook has made no showing of the type of extraordinary circumstances which would allow it to participate as a party at this stage of the proceedings despite its failure to participate as a party below. Northbrook's petition for leave to intervene, and its petition for writ of certiorari, should therefore be summarily denied.

Respondents do not, however, oppose Northbrook's suggestion in the alternative that its petition for certiorari be treated as an *amicus curiae* brief in support of Celotex's petition for writ of certiorari.

Turning to the "more difficult issue" raised by Celotex's appeal, the Fifth Circuit then considered whether the equitable powers conferred on the bankruptcy court by section 105(a) of the Bankruptcy Code allowed the bankruptcy court to interfere with the Edwards' attempt to collect from Northbrook, a stranger to the Celotex bankruptcy, in federal court in Texas.

The Fifth Circuit found that the bankruptcy court was without power to enjoin collection attempts against non-debtors that do not implicate the debtor's property, and thus held that the district court was correct in ordering execution on the supersedeas bond notwithstanding the injunction. The court acknowledged that section 105(a) generally authorizes bankruptcy courts to enjoin proceedings that threaten the integrity of a bankrupt's estate, but observed that "the integrity of the estate is not implicated in the present case because the debtor has no present or future interest in this supersedeas bond." 6 F.3d at 320; Celotex App. 19; Northbrook App. 16. The court concluded that "[w]hatever the ultimate scope of section 105, it does not extend so far as to give the bankruptcy court authority over a supersedeas bond in which it has no interest." *Id.* The Fifth Circuit expressly acknowledged that its holding conflicted with that of the Fourth Circuit in *Willis*, in which the Fourth Circuit reversed an order nearly identical to the order involved in the instant case based on the Celotex bankruptcy court's section 105(a) stay order. 6 F.3d at 320; Celotex App. 19; Northbrook App. 16.²

² Judge Jones issued a concurring opinion in which she noted that because the bankruptcy court's section 105(a) stay

In denying Celotex's motion for rehearing and suggestion for rehearing en banc, the Fifth Circuit took the opportunity to explain that it had not reversed an order of a bankruptcy court in a different circuit (as claimed by Celotex), but had instead affirmed an order by an inferior court within its jurisdiction which was premised on a finding that the bankruptcy court's order was ineffective. Thus, the Fifth Circuit panel observed, "we have not held that the bankruptcy court in Florida was necessarily wrong; we have only concluded that the district court, over which we *do* have appellate jurisdiction, was right." 6 F.3d at 321; Celotex App. 22 (emphasis added).

ARGUMENT

The Edwards agree with Petitioners Celotex and Northbrook that the Fifth Circuit's decision in this case upholds a collateral attack on a stay order issued by a bankruptcy judge in another circuit. The Edwards also agree with Petitioners that the decision in this case expressly and directly conflicts with the decision of the Fourth Circuit in *Willis v. Celotex Corp.*, 978 F.2d 146 (4th

order did not by its terms enjoin proceedings against Northbrook, she would not reach the issue of whether the bankruptcy court had the power under section 105(a) to enjoin enforcement of supersedeas bonds against third parties. 6 F.3d at 321; Celotex App. 21; Northbrook App. 18. As the Fifth Circuit majority noted, however, in subsequent orders the bankruptcy court made clear that its order of October 17, 1990 was intended to, and did, enjoin collection attempts like those made by the Edwards against Northbrook in this case. 6 F.3d at 315 n.3, 318-19; Celotex App. 6 n.3, 15-16; Northbrook App. 5 n.3, 13.

Cir. 1992), *cert. denied*, 113 S.Ct. 1846 (1993). The Edwards disagree, however, with the contention of Petitioners that the Court must exercise its discretionary power of review to resolve these jurisdictional conflicts.

Celotex contends that the Fifth Circuit's order of affirmance must be reversed because "collateral attacks on orders in other circuits are impermissible," unless the aggrieved party first attacks the order in a direct appeal. Celotex Pet. at 16. Similarly, but more precisely, Northbrook asserts that this Court has established that "persons subject to an injunctive order issued by a court *with jurisdiction* are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." Northbrook Pet. at 15, quoting *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 386 (1980) (emphasis added). But neither Celotex nor Northbrook has presented a persuasive reason for reviewing the Fifth Circuit's order. Celotex's description of the law of judgments is simply inaccurate; this Court has expressly condoned the practice of collaterally attacking invalid court orders, particularly when the party complaining of the order was not a named party to the original proceeding. *See, e.g., Martin v. Wilkes*, 490 U.S. 755 (1989), upholding a collateral attack on a consent decree notwithstanding the plaintiffs' failure to intervene and appeal in the original action. Northbrook's statement of the law is more accurate, but less relevant; both the Edwards and the courts below deny that the injunctive order relied upon by Northbrook and Celotex was issued by a court "with jurisdiction," so as to bring the case within the rule against collateral attacks stated by this

Court in *GTE Sylvania*.³ There is simply nothing novel or extraordinary in the Fifth Circuit's decision or reasoning which would warrant the exercise of discretionary review by this Court.

Northbrook complains that compliance with the Fifth Circuit's order would subject both Northbrook and the Edwards to the imposition of sanctions by the bankruptcy court for violating the bankruptcy court's stay order. Nothing in the bankruptcy court's stay order, however, suggests that Northbrook would be violating the order by passively permitting execution on the bond or even by voluntarily satisfying a demand for payment based on the Fifth Circuit's judgment.⁴ Celotex App. 26-29; Northbrook App. 33-36. Northbrook's fear that the Edwards' attempt to enforce the Fifth Circuit's order may prompt the bankruptcy court to sanction the Edwards is more realistic, but Northbrook is hardly the appropriate party to raise this concern.

³ As the Fifth Circuit observed, "a generalized and theoretical concern for the bankrupt's estate" will not support the exercise of bankruptcy court jurisdiction over supersedeas bonds. 6 F.3d at 320; Celotex App. 20; Northbrook App. 17.

⁴ What probably worries Northbrook is not that it may be held in contempt by the bankruptcy court for paying on the bond, but that it may pay on the bond and then be prevented from enforcing its rights against Celotex. But that is the risk that Northbrook assumed by issuing the bond. As the Fifth Circuit recognized, the very purpose of a supersedeas bond is to shift the risk of the judgment debtor's future insolvency from the prevailing plaintiff (here, the Edwards) to the surety (Northbrook). 6 F.3d at 319; Celotex App. 18; Northbrook App. 15.

Celotex attempts to portray this case as an apocalyptic "collision" between the type of adversarial, narrow-minded "litigation philosophies" that have "fueled the asbestos mess," exemplified by the Fifth Circuit's decision below, and the more equitable "bankruptcy philosophies" that would grant all creditors their "fair share" of what they are owed by a company that has been driven into bankruptcy by hundreds of thousands of claims, exemplified by the bankruptcy court's stay order. Celotex Pet. at 3-4, 11-12. In reality, this case simply involves the Fifth Circuit's recognition that a bankruptcy court's ability to accomplish what it believes to be a fair and socially desirable reorganization is limited, at a minimum, by its own jurisdiction. The Fifth Circuit itself observed that although "using the bankruptcy court as a clearing house for all of these cases may seem desirable as a policy matter, section 105(a) simply does not give bankruptcy courts authority over assets that are not property of the debtor's estate and in which the debtor has no interest." *Edwards*, 6 F.3d at 319; Celotex App. 17; Northbrook App. 14. This Court should come to the same conclusion in holding that its intervention in this case is unwarranted.

The Fifth Circuit correctly affirmed the district court's refusal to "bow in complete obeisance" (6 F.3d at 320, Celotex App. 20, Northbrook App. 17) to a bankruptcy court stay that the bankruptcy court had no jurisdiction or power to order. The Fifth Circuit accurately perceived that to honor the bankruptcy court's attempt to stay execution on supersedeas bonds "would eviscerate the very purpose of these bonds," 6 F.3d at 319, Celotex App. 17, Northbrook App. 14, and defeat the intent of

Rules 62(d) and 65.1 of the Federal Rules of Civil Procedure. Most importantly, the decision below correctly applies the law and does justice as between the parties. The conflict between the decision in *Willis* and the more recent, more thorough, better-reasoned opinion in *Edwards* should not induce this Court to exercise its discretionary power of review.

CONCLUSION

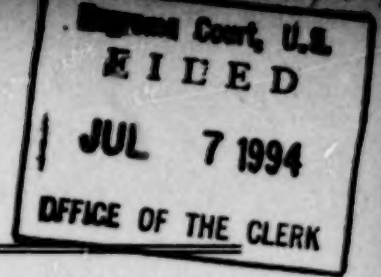
The Petitions for Writ of Certiorari should be denied.

Respectfully submitted.

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April 25, 1994

(3)
No. 93-1504



In The
Supreme Court of the United States
October Term, 1993

THE CELOTEX CORPORATION,

Petitioner,

v.

BENNIE EDWARDS and JOANN EDWARDS,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed March 22, 1994
Certiorari Granted May 23, 1994

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Supplemental Response in Opposition to Motion for Release of Supersedeas Bond filed by The Celotex Corporation in the United States Dis- trict Court for the Northern District of Texas on July 29, 1991	53
Joint Status Report filed by the Edwardses, The Celotex Corporation and Northbrook Property and Casualty Insurance Co. in the United States District Court for the Northern District of Texas on February 3, 1992	57
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<p>The following items have been omitted in print- ing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Writ of Certiorari:</p>	
<i>Edwards v. Armstrong World Industries, Inc., et al.</i> , 6 F.3d 312 (5th Cir. 1993).....	Pet. App. 1

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RELEVANT DOCKET ENTRIES

United States District Court for
the Northern District of Texas

August 17, 1987	ORIGINAL COMPLAINT and JURY DEMAND
April 17, 1989	JUDGMENT that Pltf Recover from Deft, The Celotex Corporation the following: (1) Bennie Edwards shall recover past damages in the sum of \$10,195.60 with prejudgment interest at rate of 10% per annum to accrue from Sept. 21, 1986 until date of judgment and future damages in sum of \$14,288.20; (2) JoAnn Edwards shall recover past damages in sum of \$3,590.00 with prejudgment interest at rate of 10% per annum to accrue Sept. 21, 1986 until date of judgment and future damages in sum of \$7,180.00; that Pltfs recover from Deft Celotex punitive damages in sum of \$245,500.00 and their costs of action and interest on judgment at rate of 9.51% per annum as provided by law from date of judgment. (2)(cc attys)
May 31, 1989	MOTION. (Celotex re: Supersedeas bond)
June 6, 1989	ORDER . . . upon consideration of Deft The Celotex Corporation's Motion for filing of supersedeas bond, it is hereby ORDERED that the bond in the amount of

\$294,987.88 with Northbrook Property and Casualty Insurance Company be filed with the District Clerk as supersedeas of the judgment entered in this cause. Copies to all cnsl of record

June 6, 1989 SUPERSEDEAS BOND with Northbrook Property and Casualty Insurance Company are held and firmly bound unto Bennie Edwards and JoAnn Edwards in the full and just sum of \$294,987.88. (3)

June 21, 1989 NOTICE OF APPEAL BY THE CELOTEX CORP. - fee paid

October 10, 1990 Certified Copy of JUDGMENT, USCA5 on 89-1570 wherein it states that the judgment of the District Court is AFFIRMED . . . ISSUED AS MANDATE 9-20-90. It is further ORDERED that the defendant-appellant pay to the plaintiffs-appellees the costs on appeal to be taxed by the Clerk of the USCA5. Copies to all parties, CCR, Judge Mary Lou Robinson

May 3, 1991 MOTION FOR RELEASE OF SUPERSEDEAS BOND (Pla)

May 3, 1991 MEMORANDUM IN SUPPORT OF THE MOTION FOR RELEASE OF SUPERSEDEAS BOND

May 21, 1991 NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY MEMORANDUM IN OPPOSITION TO MOTION FOR

RELEASE OF SUPERSEDEAS BOND. (50+, under separate cover)

May 23, 1991 RESPONSE IN OPPOSITION TO MOTION FOR RELEASE OF SUPERSEDEAS BOND. (4) (Celotex)

May 23, 1991 MEMORANDUM IN SUPPORT OF RESPONSE IN OPPOSITION TO MOTION FOR RELEASE OF SUPERSEDEAS BOND. (20)

July 29, 1991 SUPPLEMENTAL RESPONSE IN OPPOSITION TO MOTION FOR RELEASE OF SUPERSEDEAS BOND. (The Celotex Corporation) (13)

August 22, 1991 PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR RELEASE OF SUPERSEDEAS BOND. (Pltfs) (14)

February 3, 1992 JOINT STATUS REPORT (7)

May 27, 1992 ORDER . . . RE: Pla's Mtn for Release of Supersedeas Bond; Said Mtn is hereby granted; it is ORDERED that plaintiffs may execute on said bond executed by Northbrook Property and Casualty Insurance Company on May 17, 1989 to secure the judgment entered in plaintiffs favor against The Celotex Corp. Copies to all parties.

June 26, 1992 NOTICE OF APPEAL . . . BY THE Celotex Corporation (Dft) from the ORDER authorizing the execution

of the supersedeas bond that was entered in this action on the 27th day of May, 1992.

United States Court of Appeals
for the Fifth Circuit

September 22, 1992 Brief for Appellant
November 17, 1992 Brief for Appellee
December 4, 1992 Reply Brief for Appellant
November 5, 1993 Opinion of the United States Court
of Appeals for the Fifth Circuit-
Affirmed
November 19, 1993 Petition for Rehearing
December 22, 1993 Order Denying Rehearing

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS and §
JOANN EDWARDS §
VS. § CIVIL ACTION
§ NO. 7-87-0050
THE CELOTEX CORPORATION, §
EL AL. §

MOTION FOR RELEASE OF SUPERSEDEAS BOND

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW BENNIE EDWARDS and JOANN EDWARDS, plaintiffs herein, and, pursuant to Rule 65.1 of the Federal Rules of Civil Procedure, moves the court for release of the supersedeas bond posted by Northbrook Property and Casualty Insurance Company to secure the judgment against defendant Celotex Corporation. In support thereof, plaintiffs would respectfully show the court the following:

1. On April 17, 1989, after receiving a jury verdict in plaintiffs' favor, the court entered judgment against defendant Celotex Corporation in the total amount of \$281,025.80. A copy of the judgment is attached hereto as Exhibit "A."

2. On June 6, 1989, the court entered an order allowing defendant Celotex Corporation to file a supersedeas bond executed by Northbrook Property and Casualty Insurance Company in the amount of \$294,987.88 in order to stay execution of the judgment pending appeal. A copy of the order allowing the filing of the supersedeas bond,

with a copy of the bond itself attached, is attached hereto as Exhibit "B."

3. The Fifth Circuit Court of Appeals issued its judgment affirming the district court's judgment against Celotex Corporation on September 20, 1990, and issued its mandate to the district court on October 12, 1990. Copies of the Fifth Circuit's judgment and mandate transmittal letter are attached hereto as Exhibits "C" and "D," respectively. Celotex did not file a petition for rehearing or move to stay the mandate.

4. On October 12, 1990, before satisfying the judgment, Celotex Corporation filed a petition for reorganization in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, Nos. 90-10016-8B1 and 90-10017-8B1. To date, Celotex has not paid the judgment entered in this case.

5. In light of Celotex's nonpayment of the judgment, plaintiff seeks to enforce the terms of the supersedeas bond executed by Northbrook Property and Casualty Insurance Company, under which Northbrook Property and Casualty Insurance Company is fully and independently liable on the judgment.

6. Rule 65.1 of the Federal Rules of Civil Procedure provides that a surety's liability "may be enforced on motion without the necessity of an independent action." Under this Rule, plaintiff is allowed to enforce Northbrook Property and Casualty Insurance Company's liability on the judgment against Celotex through this motion.

7. In further support of this motion, plaintiff would respectfully refer the court to the Memorandum of Law accompanying the motion.

WHEREFORE, PREMISES CONSIDERED, plaintiff respectfully prays for an order allowing plaintiff to collect the judgment in this case from Northbrook Property and Casualty Insurance Company, which is liable under the terms of the supersedeas bond that it executed to stay enforcement of the judgment against Celotex Corporation pending appeal.

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that he has conferred with Mr. Jeffrey W. Warren, bankruptcy counsel for Celotex Corporation, who advised him that Celotex Corporation will oppose this motion.

Respectfully submitted,
BARON & BUDD, P.C.
8333 Douglas Avenue
Tenth Floor
Dallas, Texas 75225
(214) 369-3605

/s/ Brent M. Rosenthal
BRENT M. ROSENTHAL

/s/ Joseph F. Bruegger
JOSEPH F. BRUEGGER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Release Supersedeas Bond was mailed on this 2nd day of MAY, 1991 to Elizabeth M. Thompson, Butler & Binion, 1500 First Interstae [sic] Bank Plaza, Houston, Texas 77002, trial counsel for Celotex; Jeffrey W. Warren, Bush, Ross, Gardner, Warren & Rudy, P.A., 220 South Franklin Street, Tampa, Florida 33602, bankruptcy counsel for Celotex; and Northbrook Property and Casualty Insurance Company, 51 West Higgins Road, South Barrington, Illinois 60010 (Attention: Surety Bond Department), the surety.

/s/ Brent M. Rosenthal
BRENT M. ROSENTHAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS, et al.,	*	
Plaintiffs,	*	
VS.	*	CIVIL ACTION
CELOTEX CORPORATION, et al.,	*	NO. CA 7-87-50
Defendants.	*	

JUDGMENT

This action came on for trial before the Court and a jury, and issues having been duly tried and the jury having duly rendered its verdict,

It is ORDERED, ADJUDGED and DECREED that the Plaintiffs recover from Defendant, the Celotex Corporation, the following sums:

1. Bennie Edwards shall recover past damages in the sum of Ten Thousand, One Hundred Ninety-Five Dollars and Sixty Cents (\$10,195.60), with prejudgment interest at the rate of 10% per annum to accrue from September 21, 1986 until the date of this judgment, and future damages in the sum of Fourteen Thousand, Two Hundred Eighty-Eight Dollars and Twenty Cents (\$14,288.20).

2. Joann Edwards shall recover past damages in the sum of Three Thousand, Five Hundred Ninety Dollars

PLAINTIFF'S EXHIBIT "A"

and No Cents (\$3,590.00), with prejudgment interest at the rate of 10% per annum to accrue from September 21, 1986 until the date of this judgment, and future damages in the sum of Seven Thousand, One Hundred Eighty Dollars and No Cents (\$7,180.00).

It is further ORDERED, ADJUDGED and DECREED that Plaintiffs, Bennie Edwards and Joann Edwards, recover from Defendant, Celotex Corporation, punitive damages in the sum of Two Hundred Forty-Five Thousand, Five Hundred Dollars and No Cents (\$245,500.00).

It is further ORDERED, ADJUDGED and DECREED that Plaintiffs, Bennie Edwards and Joann Edwards, shall recover from Defendant, Celotex Corporation, their costs of this action, and interest on the judgment at the rate of 9.51% per annum as provided by law from the date of this judgment.

ENTERED this 17th day of April, 1989.

/s/ Mary Lou Robinson
MARY LOU ROBINSON
UNITED STATES DISTRICT
JUDGE

ENTERED ON DOCKET
APR 19 1989 PURSUANT
TO F.R.C.P. RULES
58 AND 79a.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS,	§	
ET. AL.	§	C.A. NO. 7-87-50
VS.	§	
	§	
THE CELOTEX CORPORATION,	§	
ET. AL.	§	

ORDER

Upon consideration of Defendant The Celotex Corporation's Motion for filing of supersedeas bond, it is hereby ORDERED that the bond in the amount of \$294,987.88 with Northbrook Property and Casualty Insurance Company be filed with the District Clerk as supersedeas of the judgment entered in this cause.

SIGNED this 5th day of June, 1989.

/s/ Mary Lou Robinson
JUDGE PRESIDING

PLAINTIFF'S EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS ET AL §
vs. § CIVIL ACTION
 § NO. CA-7-87-50
CELOTEX CORPORATION §
ET AL §

KNOWN ALL MEN BY THESE PRESENTS:

That we, NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY, are held and firmly bound unto BENNIE EDWARDS AND JOANN EDWARDS in the full and just sum of TWO HUNDRED NINETY FOUR THOUSAND NINE HUNDRED EIGHTY SEVEN DOLLARS AND EIGHTY-EIGHT CENTS (\$294,987.88), to be paid to the said Bennie Edwards and Joann Edwards, their heirs, executors, administrators, successors, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, or assigns, jointly and severally by these presents.

WHEREAS, in a suit pending in the United States District Court for the Northern District of Texas, Wichita Falls Division, under Civil No. CA-7-87-50, between Bennie Edwards and Joann Edwards, Plaintiffs, and Celotex Corporation, Defendant, judgment was entered in favor of Bennie Edwards and Joann Edwards and against Celotex Corporation in the amount of TWO HUNDRED EIGHTY THOUSAND SEVEN HUNDRED FIFTY THREE DOLLARS AND EIGHTY CENTS (\$280,753.80), and Celotex Corporation having filed an appeal to the United

States Court of Appeals for the Fifth Circuit from the entry of that judgment.

NOW, the condition of the above obligation is such that if the said Celotex Corporation shall prosecute said appeal and answer to Bennie Edwards and Joann Edwards for all damages, interest, and cost, then this obligation shall be void; otherwise it shall remain in full force and effect.

Dated: May 17, 1989

THE CELOTEX CORPORATION

By: /s/ Charles E. Robinson
Charles E. Robinson
Secretary

NORTHBROOK PROPERTY AND
CASUALTY INSURANCE COMPANY

By: /s/ Timothy J. Brady By: /s/ Martin J. Mulvihill
Timothy J. Brady, Martin J. Mulvihill
Resident Agent Attorney-in-Fact

Approved this 5th day of June, 1989.

/s/ Mary Lou Robinson
UNITED STATES JUDGE

NORTHBROOK PROPERTY AND
CASUALTY INSURANCE COMPANY

(A STOCK INSURANCE COMPANY, HEREIN CALLED
NORTHBROOK, OR THE COMPANY)
HOME OFFICE • NORTHBROOK, ILLINOIS

KNOW ALL MEN BY THESE PRESENTS: That Northbrook Property and Casualty Insurance Company, a corporation organized and existing under the laws of the State of Illinois, and having its principal office at Allstate Plaza, Northbrook, County of Cook, State of Illinois, does hereby appoint:

Martin J. Mulvihill

its true and lawful agents and Attorneys-in-Fact, individually, to make, execute, and sign, acknowledge, affix the Company Seal to, and deliver any and all surety bonds, consents, undertakings, and other writings obligatory in the nature of a bond, for and on behalf of said Company and as act and deed or said Company, with a limit not to exceed \$5,000,000.00 any single instrument. This authority shall expire without notice at midnight of December 31, 1989, unless revoked sooner in writing. This appointment is made under and by authority of the following provision of the By-Laws of the Company which provision is now in full force and effect and is the only applicable provision of said By-Laws.

ARTICLE V. SECTION 1.

All policies of insurance issued by this Company shall comply with the laws of the respective states, territories or jurisdictions in which the policies are issued. All

bonds, undertakings, certificates of insurance, cover notes, recognizances, contracts of indemnity, endorsements, stipulations, waivers, consents of sureties, reinsurance acceptances or agreements, surety and co-surety obligations and agreements, underwriting undertakings, and all other instruments pertaining to the insurance business of the Company, shall be validly executed when signed on behalf of the Company by (1) the Chairman of the Board, (2) the President, (3) any Vice President or Assistant Vice President or (4) any other officer, employee, agent, or Attorney-in-Fact authorized in writing to so sign by the Chairman of the Board, the President, or any Vice President. All policies of insurance should bear the signature of the President and of the Secretary, which signatures may be facsimiles, and shall be countersigned by a duly licensed resident agent where so required by law or regulation. A facsimile signature of a former officer shall be of the same validity as that of an existing officer.

The affixing of the Company's Seal shall not be necessary to the valid execution of any instrument but the Secretary, any Assistant Secretary, or any officer, employee, agent, or Attorney-in-Fact authorized in writing so to do by the Secretary, any Assistant Secretary, or any Vice President, may affix the Company's Seal thereto.

This Power of Attorney is signed and sealed by facsimile under and by authority of the following Resolution voted by the Board of Directors of Northbrook Property and Casualty Insurance Company at a meeting duly called and held on the 12th day of December 1978.

BE IT RESOLVED, That the signatures of the President, the Secretary, and Vice President, or any Assistant Vice

President, and the seal of the Company may be affixed by facsimile to any power of attorney or to any certificate relating thereto appointing Attorneys-in-Fact for the purpose of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, and any such power of attorney or certificate so executed by and bearing such facsimile signature or signatures and facsimile seal shall be valid and binding upon the Company; and, in particular, shall be valid and binding in the future with respect to any bond or undertaking or other writing obligatory in the nature thereof to which it is attached for such purpose.

IN WITNESS WHEREOF, NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY has caused these presents to be signed by its President and its Corporate Seal to hereto affixed, on this 20th day of May, A.D., 1988.

(Seal)

STATE OF ILLINOIS
COUNTY OF COOK ss.

NORTHBROOK PROPERTY AND
CASUALTY INSURANCE COMPANY

By /s/ Robert A. Leibold
President

I, Brenda Su Bjankini a Notary Public, do hereby certify that Robert A. Leibold personally known to be the same person who is President of the NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY a corporation of the State of Illinois, subscribed to the

foregoing instrument, appeared before me on this 20th day of May, A.D., 1988, in person and acknowledged that he being thereunto duly authorized signed, sealed and delivered the said instrument as the free and voluntary act of said corporation and as his own free and voluntary act for uses and purposes therein set forth.

"OFFICIAL SEAL"
BRENDA SU BJANKINI
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 1/2/90

/s/ Brenda Su Bjankini
Notary Public

My Commission expires
January 2, 1990

CERTIFICATION

I, the undersigned President of NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY, DO HEREBY CERTIFY that the foregoing Power of Attorney is now in full force and effect.

Signed and sealed at Northbrook, Illinois this 17th day of May, A.D., 1989.

(Seal)

/s/ Robert A. Leibold
President

**Bennie EDWARDS, et al.,
Plaintiffs-Appellees,**

v.

**ARMSTRONG WORLD INDUSTRIES,
INC., et al., Defendants.**

**The Celotex Corporation,
Defendant-Appellant.**

No. 89-1570.

**United States Court of Appeals,
Fifth Circuit.**

Sept. 20, 1990.

Insulator suffering from asbestosis brought action against successor to manufacturer of asbestos-containing insulation products. The United States District Court for the Northern District of Texas, Mary Lou Robinson, J., entered judgment against successor, including punitive damages, and successor appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) punitive damages were properly imposed upon successor for acts of predecessor; (2) punitive damages award of \$245,500 was not excessive; and (3) punitive damages award did not violate due process clauses of Texas and Federal Constitutions and Texas Constitution's excessive fines clause, even though multiple punitive damages awards have been assessed against successor for single course of conduct.

Affirmed.

**Appeal from the United States District Court for the
Northern District of Texas.**

PLAINTIFF'S EXHIBIT "C"

Before POLITZ, JOLLY, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Celotex Corporation appeals the punitive damage award in favor of plaintiffs, Bennie and Joann Edwards, for asbestosis related to Bennie Edward's exposure to asbestos-containing products. Celotex principally contends that the district court erred in assessing punitive damages against Celotex for the acts of its predecessor, Philip Carey; the punitive damages are excessive; and the award of punitive damages violates Celotex's federal and state constitutional rights. We affirm the judgment of the district court.

I. Facts

While working for sixteen years as an insulator, Bennie Edwards was exposed to asbestos-containing insulation products manufactured by several companies, including Philip Carey Corporation, a predecessor of Celotex. He contracted asbestosis. Plaintiffs' claims necessarily assumed, and the court held, that Celotex is liable as the successor-in-interest to Philip Carey. The jury awarded the plaintiffs a total of \$491,000 in actual damages. Because Celotex was found 7.18% responsible for the damages, a judgment of \$35,525.80 in compensatory damages resulted. Additionally, the jury awarded the plaintiffs punitive damages of \$245,500 against Celotex. Celotex argued in both a Rule 59 motion and in a Motion for Entry of Judgment that the district court should award only compensatory damages against Celotex or order a remittitur as to the amount of punitive damages.

Upon the denial of these motions, Celotex timely appealed.

II. Punitive Liability of a Successor Corporation

Celotex adroitly contends that Texas law would not impose liability for punitive damages upon it as a corporate successor to Philip Carey.¹ In part, Celotex suggests, this result follows from state corporate law principles, but also and more importantly because penalizing Celotex for the sins of Philip Carey would disserve the state's twin goals of punishment and deterrence. In two recent cases we have rejected these arguments, finding that they both depended upon evidence of Celotex's corporate history that was not in the record. *Aguirre v. Armstrong World*

¹ Celotex also maintains that there was neither any evidence that it was grossly negligent nor evidence that Edwards was exposed to Celotex products. This claim is misplaced, however, because the award of punitive damages was predicated upon the alleged acts or omissions of Philip Carey. The district court's charge to the jury instructed that "the Celotex Corporation is the successor-in-interest to Philip Carey Manufacturing Corporation and, as such, has assumed all the ordinary liabilities of Philip Carey Manufacturing Corporation." Individual jury interrogatories concerning Edwards's exposure to the defendants' products, whether the products were unreasonably dangerous, whether the products had adequate warnings, and whether the defendants were grossly negligent, each included a checklist of the defendants and identified "The Celotex Corporation (successor to Philip Carey Manufacturing Corporation)." Inasmuch as Celotex's liability was claimed to be derivative of that of Philip Carey, no proof of Celotex's actions or omissions was warranted. Celotex's "no evidence" argument represents merely another way to characterize its dispute with the derivative theory, which we address above.

Industries, Inc., 901 F.2d 1256, 1258 (5th Cir.1990); *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022, 1029 (5th Cir.1990). We reject them again here for the same reason. Celotex made no effort to seek a ruling in the trial court that would favorably characterize – under Texas or other applicable law – its acquisition of Philip Carey by means of a stock purchase of Carey's owner corporation followed immediately by an "agreement of merger."² Perhaps painfully aware that its efforts to avoid liability for punitive damages based on its purchase of Philip Carey have been largely unsuccessful,³ Celotex chose to tantalize the trial court rather than to fulfill by truly joining issue, with the necessary proof, on the legal significance of its status as a successor corporation.

III. Excessiveness of Punitive Damages

Celotex alternatively seeks a remittitur of the punitive damages of \$245,500 which under Texas law should be reasonably proportioned to the amount of actual damages. *Alamo National Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex.1981). Punitive damages here total nearly seven times the actual damages apportioned against Celotex.

² The 1972 "agreement of merger" between Panacon Corporation (as Philip Carey's owner was then called) and Celotex was offered in evidence by *plaintiffs*, perhaps to point out that Celotex assumed Panacon's liabilities in the broadest possible terms. Otherwise, Philip Carey's rather complex corporate history is recited, though not proven, by Celotex in the introduction to a pretrial memorandum. The trial court was not asked to ferret out the implications of these transactions for purposes of considering exemplary damages.

³ See cases cited in *Aguirre*, 901 F.2d at 1258.

Notwithstanding requiring reasonable proportionality, however, *Kraus* held that there can be no set rule or ratio between the amount of actual and exemplary damages which will be considered reasonable, and that each case must be analyzed according to several factors:

- (1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability of the wrongdoer, (4) the situation and sensibilities of the parties concerned, and (5) the extent to which such conduct offends a public sense of justice and propriety. *Id.*

Contrary to the Edwards's position, Texas does not require that "reasonable proportionality" be evaluated according to the total amount of actual damages rather than the proportionate share allocated against Celotex. In *John Deere Co. v. May*, 773 S.W.2d 369, 377-78 (Tex.App. - Waco 1989, writ denied), the court determined the reasonableness of a punitive damage award by measuring it against a defendant's share of actual damages. The court concluded that a \$550,000 punitive damage award was not excessive compared to the co-defendant's 15% liability for actual damages of \$1,050,000 (\$157,500).

Although we review the proportionality of the punitive damage award against Celotex in comparison with its allocated share of actual damages, however, we do not find it so excessive as to suggest that passion rather than reason motivated the jury. *Wright v. Gifford Hill & Co., Inc.*, 725 S.W.2d 712, 714 (Tex.1987) (quoting *Tynberg v. Cohen*, 76 Tex. 409, 416, 13 S.W. 315, 316 (1890)). The conduct of Philip Carey in marketing its asbestos products, as reported at trial, could support an award of gross negligence. Celotex contests neither the jury finding nor

the other *Kraus* factors bearing on the size of the punitive damage award. Moreover, the award in this case is not grossly disproportionate to other punitive damage awards under Texas law.⁴ See, e.g., *King, supra* (punitive damages - \$1,550,000; actual damages about \$1 million); *Aguirre, supra* (punitive damages \$201,000; actual damages \$658,000); *Victoria Bank & Trust Co. v. Brady*, 779 S.W.2d 893, 912 (Tex.App. - Corpus Christi 1989), writ granted, (1990) (\$2.2 million punitive damages; actual damages \$495,000); *Donnel v. Lara*, 703 S.W.2d 257, 261-62 (Tex.App. - San Antonio 1985, writ ref'd n.r.e.) (\$4,500 punitive damage award not excessive where jury awarded two dollars (\$2.00) as actual damages for harassing phone calls); *Russell v. Truitt*, 554 S.W.2d 948, 956 (Tex.Civ.App. - Fort Worth 1977, writ ref'd n.r.e.) (\$55,000 punitive damage award not excessive as compared to \$8,000 in actual damages).

IV. Constitutional Limitations

Celotex finally repeats its arguments that multiple punitive damage awards for a single course of conduct violate the due process clauses of the Texas and federal constitutions and the Texas constitution's excessive fines clause, Art. I § 13. This court resolved such arguments against Celotex in *King, supra*, and there is no controlling difference between the two cases. That Celotex did not

⁴ Texas recently enacted a statutory cap on punitive damage awards, generally limiting them to four times actual damages or \$200,000, whichever is greater. Tex.Civ.Prac. & Rem.Code Ann. §§ 41.001-008 (Vernon Supp.1988). The cap does not apply in this case.

challenge the disproportionality of the *King* punitive damage award, but does so challenge the instant award, does not affect the application of *King* for several reasons. First, we have reviewed the award in accord with Texas legal principles and found it substantiated. Celotex has not asserted that federal procedural due process limits are transgressed by the application of Texas punitive damage law in an individual case. Second, we do not perceive the punitive damage award here as being so individually outrageous as to shock the judicial conscience even though it has survived scrutiny under state law. See *Browning-Ferris Indus. v. Kelco Disposal Co., Inc.*, ___ U.S. ___, 109 S.Ct. 2909, 2923, 106 L.Ed.2d 219 (1989) (Brennan and Marshall, JJ., concurring). Third, a challenge of excessiveness as to an individual punitive damage award does not reach the broader issue of the propriety of serial punitive damage awards in mass tort litigation.

As for Celotex's pleas for relief from the onslaught of serial punitive damage awards, we can only echo *King's* "misgivings" that no due process or legislative remedy is available in this circuit. 906 F.2d at 1033. Compare *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2d Cir.1990), petition for cert. filed, No. 90-121 (July 16, 1990) (outlining possible theories of due process violation). Celotex supplemented its post-trial motions in this case with affidavits reflecting that between September, 1988 and March, 1989, judgments for punitive damages exceeding \$10 million were entered against it, compared with \$15 million in adverse actual damage judgments. If no change occurs in our tort or constitutional law, the time will arrive when Celotex's liability for punitive damages

imperils its ability to pay compensatory claims and its corporate existence. Neither the company's innocent shareholders, employees and creditors, nor future asbestos claimants will benefit from this death by attrition.

With our own misgivings, we AFFIRM.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK

TEL. 504-589-6314
600 CAMP STREET
NEW ORLEANS,
LA. 70130

October 12, 1990

Mrs. Nancy Hall Doherty, Clerk
U. S. District Court
1000 Lamar, Room 203
Wichita Falls, TX 76307

No. 89-1570 - Edwards vs. Armstrong
(D.C #CA 7 87 50)

-
- ☒ Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.
 - ☐ Enclosed to you only is a certified copy of the Rule 47.6 Decision in the above case issued as and for the mandate.
 - ☐ The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.
 - ☐ Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

PLAINTIFF'S EXHIBIT "D"

- ☐ We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

- ☒ Copy of the Court's opinion.
- ☒ Original record on appeal or review. 9 Volumes
- ☒ Other original papers forwarded with record.
- Envelope 1 Box
- ☐ Bill of Costs approved by this Court. Copy enclosed to counsel.

Sincere

GILBERT F. GANUCHEAU, Clerk

By: /s/ Jean Anderson
Deputy Clerk

cc: (Letter Only)
Judge Mary Lou Robinson
Ms. Elizabeth M. Thompson
Mr. Brent M. Rosenthal

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS and)	CIVIL ACTION
JOANN EDWARDS)	NO. 7-87-0050
)	
vs.)	
CELOTEX)	
CORPORATION, ET AL.)	

NORTHBROOK PROPERTY AND CASUALTY
INSURANCE COMPANY MEMORANDUM IN
OPPOSITION TO MOTION FOR RELEASE
OF SUPERSEDEAS BOND

Northbrook Property and Casualty Insurance Company ("Northbrook") – the issuer of the supersedeas bond in question – opposes plaintiffs' motion for release of the supersedeas bond. Not only is that motion stayed by the Celotex bankruptcy, but the supersedeas bond matter is *sub judice* in the bankruptcy court.

I. Introduction

The instant case is one of approximately 100 asbestos-related cases against Celotex in which a supersedeas bond was posted by or at the instance of one of Celotex's liability insurers. The bond here, as in other cases, is secured by the proceeds of Celotex's insurance policies.

Northbrook posted the instant bond pursuant to a settlement agreement which provides that the insurer pay

specified amounts on specific dates to satisfy a disputed insurance coverage obligation. The settlement agreement insurance proceeds are restricted for use only in the defense and indemnity of asbestos-related claims. Any payment the insurer makes on the supersedeas bonds, moreover, has the effect of reducing by an equal or greater amount the insurance payments the insurer must make to debtors under the settlement agreement.

Celotex is in bankruptcy. The status of the supersedeas bonds as property of the debtors' estates raises complex bankruptcy questions, arguably of first impression.¹ The Tampa, Florida bankruptcy court – where the reorganization case pends – has requested that interested parties submit memoranda as to whether the supersedeas bonds constitute "property of the estate" or, alternatively, whether a debtor in Chapter 11 has a protectable interest in such bonds. The matter has been fully briefed in the bankruptcy court. Indeed, plaintiffs' counsel here submitted a memorandum to the bankruptcy court (Exhibit A hereto) and debtors' counsel has submitted a memorandum and a supplemental memorandum on the issue.²

¹ On October 12, 1990, Celotex Corporation ("Celotex") and its wholly owned subsidiary, Carey Canada Inc., filed petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, Consolidated Case Numbers 90-10016-8B1 and 90-10017-8B1.

² The facts set forth in this introduction are more fully explicated in the supplemental memorandum of debtors regarding status of supersedeas bonds, filed in the bankruptcy court last March. A copy is attached hereto as Exhibit B.

II. Plaintiffs' Motion for Release of Bond is Stayed.

A. The October 17, 1990 Stay Order Enjoins Plaintiffs' Motion.

Plaintiff's Motion is barred by the special Stay Order the bankruptcy court issued on October 17, 1990. That Order, issued pursuant to Section 105 of the Bankruptcy Code, enjoined all persons "from commencing or continuing any judicial administrative or other proceeding involving any of the Debtors" (Exhibit C, ¶ 3.) The Order applies, moreover, regardless of whether "a supersedeas bond has been posted" (*Id.*) The idea is to stop all actions which have to do with the debtors and to require, *inter alia*, that all questions pertaining to the supersedeas bonds be heard in the bankruptcy court.

The bankruptcy court has jurisdiction to determine whether an asset, such as the Northbrook supersedeas bond, constitutes property of the debtors' estates, and it has the power – which it has exercised here – to enjoin actions in all other forums which encroach upon this jurisdiction. *In re Neuman*, 71 B.R. 567 (S.D.N.Y. 1987).

In *Neuman*, the debtor sought to prosecute a pending state court action to determine whether a state health operating certificate is property of the estate and was enjoined by the bankruptcy court from "commencing or continuing in a forum other than this Bankruptcy Court . . . anything which requires, either directly or indirectly, a finding as to what is property of the estate. . . ." 71 B.R. at 570. The district court affirmed the bankruptcy court's authority to enjoin the state court action holding:

Even though the Bankruptcy Court may enjoin the state court action on the grounds that it

interferes with the reorganization proceedings, the court also has the power to issue an injunction on the grounds that the Bankruptcy Court, rather than another court, should be the forum to decide whether an asset is property of the estate.

Id. at 573.

B. The Section 362(a)(2)-(4) Stay Applies.

The Bankruptcy Code automatically stays actions against property of the estate. 11 U.S.C. § 362(a)(2)-(4). Under the agreements between debtors and their liability insurers, payment of a bond by an insurer has precisely the same effect as a payment on a liability policy.

An action against a supersedeas bond that diminishes the estate's assets is subject to the automatic stay. *Sheldon v. Munford, Inc.*, 902 F.2d 7 (7th Cir. 1990). Insurance policy proceeds are property of the estate, and the courts routinely bar individual plaintiff's actions that would diminish the amount of insurance proceeds available to the estate for equitable distribution to all tort claimants. *In re Davis*, 730 F.2d 176, 184 (5th Cir. 1984); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93-94 (3d Cir.), *cert. denied*, 488 U.S. 868 (1988); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986).

Even more importantly, it is the bankruptcy court that should determine whether § 362 of the Bankruptcy Code stays an attempt to execute on a supersedeas bond. *In re Chateaugay Corp.*, 93 B.R. 26, 28 (S.D.N.Y. 1988) ("[C]entralization of the determination of the scope of the

automatic stay was vital to the scheme of the reorganization process"); *In re Baldwin-United Corp.*, 765 F.2d 343, 345, 348-49 (2d Cir. 1985) ("We conclude that the Bankruptcy Court is entitled to determine the applicability of its stay and, under the circumstances of this case should be permitted to do so").

C. The Automatic Stay under Section 362(a)(1) Applies.

Section 362(a)(1) automatically stays "the continuation . . . of a judicial . . . action or proceeding against the debtor. . . ." The instant action is a suit against Celotex, not the third-party supersedeas bonding company.

Moreover, the appeal process is not over. On the day debtors filed their bankruptcy petitions, October 12, 1990, the time for applying to the Supreme Court for writ of certiorari in the instant matter had not run. The Fifth Circuit issued its affirmance herein on September 20, 1990. Under Supreme Court Rule 13, Celotex had 90 days therefrom to seek Supreme Court review. Pursuant to Bankruptcy Code Section 108(c), debtors now have until 30 days after the bankruptcy court grants relief from the stay to so apply. As long as prosecution of the appeal is stayed, the bond cannot be executed upon.

D. The Automatic Stay Under Section 362(a)(6) Applies.

The Section 362(a)(6) automatic stay prohibits "any act to collect, access or recover a claim against the debtor that arose before the commencement of the case under

this title." Plaintiffs' motion seeks to collect on the judgment against Celotex. The filing of a supersedeas bond does not create an exception to the automatic stay. *Sheldon v. Munford, Inc.*, 902 F.2d 7 (7th Cir. 1990). Absent relief from the stay, plaintiffs are barred from collecting on the judgment.

CONCLUSION

Northbrook's interest here is in the orderly administration of justice. The status of the bonds is *sub judice* in the bankruptcy court that is supervising the entire Celotex reorganization. Northbrook has a vital interest in not being subjected to conflicting court decisions concerning the supersedeas bonds. It also has an interest in the status of the bonds being decided economically, efficiently and expeditiously.

For the reasons stated, Plaintiffs' Motion for Release of Supersedeas Bond should be denied.

Respectfully submitted,

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Dated: May 20, 1991

9279M(1)

UNITED STATES BANKRUPTCY COURT
 MIDDLE DISTRICT OF FLORIDA
 TAMPA DIVISION

IN RE:

THE CELOTEX
 CORPORATION, et al.,
 Debtors.

Chapter 11

Consolidated Case Nos.
 90-10016-BKC-8B1 and
 90-10017-BKC-8B1

MEMORANDUM OF COUNSEL FOR
 ASBESTOS-RELATED PERSONAL INJURY
 CREDITORS REGARDING THE STATUS
OF SUPERSEDEAS BONDS

I. INTRODUCTION

On October 12, 1990, after more than two years of engaging in a "scorched-earth" approach to resolving the numerous asbestos personal injury and wrongful death claims against it, debtor the Celotex Corporation ("Celotex") filed for protection under the United States Bankruptcy Code. During the two-year period in which Celotex had refused to offer more than nuisance value in any asbestos injury case against it, more than 100 verdicts were returned against the company, totaling, by Celotex's own calculation, almost \$70 million dollars. Celotex appealed the overwhelming majority of the verdicts against it, without any apparent regard for the merits of the arguments that it would assert in its appeals. Celotex's purpose in employing this hard-line litigation strategy was obvious and undeniable, if unspoken - to delay the payment of its tort obligations, whatever the ultimate cost.

EXHIBIT A

By delaying payment of asbestos health claims through exhausting all litigation options, Celotex stood to benefit in a variety of ways. Delay of payment, of course, was an end in itself. Additionally, by clogging the trial and appellate courts with cases that in the past had routinely settled, Celotex hoped to stimulate a judicial adjustment for legislative overhaul of the tort system that would reduce Celotex's liability. Celotex had nothing to lose by engaging in this approach; if its strategy of taking virtually all cases to trial proved disastrous, and its effort to obtain judicial or legislative relief proved unsuccessful, it could still delay paying the verdicts returned against it by seeking bankruptcy protection. Moreover, it could even urge the bankruptcy court to reduce the jury awards that it owed to plaintiffs, and actually to eliminate certain types of awards.¹

Under federal law and the law of virtually every state, in order to delay enforcement of any of the verdicts against it pending appeal, Celotex was required to post a supersedeas bond in the amount of the judgment plus anticipated interest. The generally-understood and common-sense reason that the law requires the posting of a

¹ None of these goals, of course, have any legal or moral legitimacy. While Celotex was entitled to advocate a change in our constitutionally-mandated system of resolving disputes, it was not entitled to do so while addressing individual claims in bad faith, purely for purposes of delay. Celotex's argument that supersedeas bonds are subject to discharge in bankruptcy is premised on the assumption that the bankruptcy court will reduce the amounts owed by Celotex in judgments to asbestos injury creditors. Celotex's position on the supersedeas bond issue is simply a continuation of its effort to avoid, in bad faith, the valid claims of persons maimed or killed by its products.

supersedeas bond to stay enforcement of a judgment pending disposition of an appeal is protect the judgment creditor from any harm caused by delay in enforcing the judgment. The elemental type of harm that could result to a judgment creditor from delay in enforcing a judgment – the judgment debtor's declaration of insolvency after the judgment is entered but before it is affirmed and paid – is precisely the harm caused to numerous asbestos injury plaintiffs by the instant bankruptcy proceeding. Yet Celotex takes the position that supersedeas bonds, which were posted on its behalf for the protection of judgment creditors under various state and federal laws, actually afford judgment creditors no protection at all. Celotex argues that the posting of a supersedeas bond is essentially a meaningless act, a formality that affords no protection to parties with valid, enforceable judgments.

But Celotex is wrong. A plethora [sic] of decisions, both from bankruptcy courts and from courts of general jurisdiction, apply the common-sense notion that supersedeas bonds are independent obligations of third parties, and are neither property of the debtor's estate nor are property over which a bankruptcy court can exercise any jurisdiction. In opposing this overwhelming weight of authority, Celotex is unable to cite a single decision from any court in any era holding that the bankruptcy of the judgment debtor prevents the judgment creditor from obtaining full satisfaction of the judgment out of the proceeds of the supersedeas bond. The unanimity of authority, if not logic and visceral notions of fairness, compels the conclusion that supersedeas bonds posted on Celotex's behalf to stay enforcement of judgments are not

assets of Celotex, and are not subject to this court's jurisdiction or control.

II. ARGUMENT

- A. The Courts That Have Considered This Issue Have Unanimously Concluded That Supersedeas Bonds Are Not Property of the Estate in Bankruptcy, Are Not Subject to the Control of the Bankruptcy Court, and May Not Be Distributed to Other Creditors in a Bankruptcy Proceeding.

As Celotex concedes in its Memorandum Regarding the Status of Supersedeas Bonds at 9, the cases adhering to the principle that a supersedeas bond posted on behalf of debtor to stay enforcement of a judgment is not property of the debtor subject to distribution under the Bankruptcy Code are "legion."² The seminal case applying this reasoning, as Celotex correctly points out, is *Mid-Jersey Nat'l Bank v. Fidelity Mortgage Investors*, 518 F.2d 640 (3d Cir. 1975). In that case, the Third Circuit held that a certificate of deposit filed in lieu of a supersedeas bond

² *Grubb v. Federal Deposit Ins. Corp.*, 833 F.2d 222 (10th Cir. 1987); *Mid-Jersey Nat'l Bank v. Fidelity-Mortgage Investors*, 518 F.2d 640 (3d Cir. 1975); *Carter Baron Drilling v. Excel Energy Corp.*, 76 B.R. 172 (D.Colo. 1987); *Moran v. Johns-Manville Sales Corp.*, 28 B.R. 376 (Bankr. N.D. Ohio 1983); *W. W. Gay Mechanical Contractor, Inc. v. Wharfside Two*, 545 So.2d 1348 (Fla. 1989), all cited by Celotex in its Memorandum; see also *J. M. Beeson Co. v. Sartori*, 553 So.2d 180 (Fla. 4th DCA 1989); *Carter Real Estate and Development, Inc. v. Builder's Service Co.*, 718 S.W.2d 828, 829 (Tex.App. 1988); *Atlantic Richfield Co. v. Good Hope Refineries*, 604 F.2d 865 (5th Cir. 1979); *Saper v. West*, 263 F.2d 422 (2d Cir. 1959), which were not cited by Celotex but applied the same reasoning as the cases cited above.

with the clerk of the court was not property of the estate over which the bankruptcy court had jurisdiction. The Third Circuit concluded that

in the context of this case, such a deposit in court is not the property of the debtor and is not subject to the after-arising jurisdiction of the Chapter XI court. . . . Although the legal status of a deposit in court pending an appeal is not entirely pellucid, we are of the opinion that such a deposit *in custodia legis* may be considered the res of a trust. The court acts as trustee and is charged with the duty of determining the beneficiaries pursuant to the appeal.

518 F.2d at 643.

More recently, in *Grubb v. Federal Deposit Ins. Corp.*, 833 F.2d 222 (10th Cir. 1987), the Tenth Circuit ruled that the FDIC was not entitled to the return of supersedeas bonds posted by a bank to stay execution of a judgment prior to the bank's insolvency. The FDIC argued that, as a government agency, it was not required to post bonds to secure judgments, and claimed that the supersedeas bonds should be returned to the estate of the insolvent bank and distributed to creditors. 833 F.2d at 224. The court declined to release the bonds, observing that "[e]xonerating these bonds would undermine the rationale for requiring a bond pending appeal, which is to secure the judgment throughout the appeal process against the possibility of the judgment debtor's insolvency." *Id.* at 226. The court cited *Mid-Jersey* for the proposition that the bond was no longer an asset of the insolvent bank available for ratable distribution to creditors. *Id.*

Both the Second and Fifth Circuits have also applied the reasoning set forth in *Mid-Jersey* and *Grubb* in holding that judgment creditors are entitled to satisfy their claims against bankrupt defendants out of the proceeds of supersedeas bonds securing the judgments, because such bonds are not the property of the debtor and may not be included in the bankrupt's estate. See *Saper v. West*, 263 F.2d 422 (2d Cir. 1959) (funds deposited by a debtor with the clerk of the court to secure payment of a judgment pending resolution of appeal were no longer property of the debtor, and were not recoverable by trustee in bankruptcy two years later as a preference); *Atlantic Richfield Co. v. Good Hope Refineries*, 604 F.2d 865 (5th Cir. 1979) (admiralty case against defendant in Chapter XI proceedings may go forward against the debtor who posted a bond prior to filing bankruptcy, since the action would proceed against the bond, which was not property of the bankrupt's estate). Moreover, federal district courts, federal bankruptcy courts, and state appellate courts have, without exception, followed the *Mid-Jersey* holding. See, e.g., *Carter Baron Drilling v. Excel Energy Corp.*, 76 B.R. 172, 174 (D.Colo. 1987) (holding that funds deposited in lieu of a supersedeas bond "are not an asset or property of National's bankruptcy estate, and any contingent reversionary interests National had in the funds terminated on June 1, 1987, when the Tenth Circuit Court of Appeals affirmed this court's judgment against National"); *W. W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So.2d 1348, 1350 (Fla. 1989) ("We find that the supersedeas bond posted by Wharfside and Chanen is not property of the estate and will not be used to find that

plan for reorganization"); *Carter Real Estate and Development, Inc. v. Builder's Service Co.*, 718 S.W. 828, 829 Tex.App. 1986) (finding support for its holding that the supersedeas bond was not the property of the bankruptcy estate 11 U.S.C. § 534(e), which provides that "discharge of the debt of the debtor does not affect the liability of any other entity on, or the property of another entity for, such debt"). At least one federal district court has already ruled that a supersedeas bond posted by an insurance company on behalf of Celotex to stay execution of a judgment against Celotex pending appeal is not part of Celotex's estate and is not subject to the control of the bankruptcy court. *Willis vs. Celotex Corp.*, No. 87-645-N (E.D.Va. Jan. 2, 1991) (a copy of which is attached hereto).

In response to this avalanche of authority, Celotex is unable to cite a single case on point. It is forced to rely on *Sheldon v. Munsford, Inc.*, 902 F.2d 7 (7th Cir. 1990) and Judge Moore's dissent in *Grubb v. Federal Deposit Ins. Corp.*, 833 F.2d at 227-30, to support its position that supersedeas bonds are the property of its estate in bankruptcy. The *Sheldon* case is inapposite; Judge Moore's dissent is unpersuasive and stands alone.

In *Sheldon* the court held that an appeal by a judgment debtor that filed a bankruptcy petition was automatically stayed under 11 U.S.C. § 362(a) even though a supersedeas bond secured the judgment. The court did not base its decision on a belief that the supersedeas bond was ultimately the property of the debtor - indeed the court observed that "the probability is [close to] 100 percent . . . that INA [the surety] will pay the judgment if we affirm." 902 F.2d at 8. Instead, the court based its decision on its recognition that the debtor was potentially

at least theoretically liable for the judgment, that the debtor stood to benefit from a favorable disposition of the appeal, and that the appellate process itself would affect the debtor. *Id.* In acknowledging that the surety would almost certainly pay the judgment if it were affirmed, and in suggesting that the bankruptcy court would lift the automatic stay "as soon as it is satisfied that [the debtor] is adequately represented in this court," *Id.* at 9, the court's assumption that the supersedeas bond was fully available to satisfy the judgment against [sic] the debtor without restriction by the bankruptcy court was clearly intimated, if not explicitly stated, throughout the opinion.

Dissenting in *Grubb*, Judge Moore argued that the certificates of deposit tendered to the court to obtain a stay of execution in that case secured not the judgment itself, but the promise to pay the judgment. 833 F.2d at 227 (Moore, J., dissenting). Judge Moore never adequately explained, however, why this distinction should lead to a result different from that reached by the majority; either the judgment or the promise to pay the judgment was secured by the bonds deposited with the court. The majority noted that Judge Moore's approach was undesirable not only because it would deny judgment creditors the protection that they reasonably expect, but also because it would eventually prejudice judgment debtors by virtually requiring the premature enforcement of judgments.

Under the result advocated in the dissent, a supersedeas bond posted by a financially troubled national bank provides no protection for the judgment creditor. If the dissent's position were the rule, trial courts would not grant stays

of execution to potentially insolvent national banks, because any supersedeas bond posted by such a bank would not serve the purpose for which these bonds are intended. Instead, the banks would be forced to pay trial court judgments immediately, possibly driving them further toward insolvency.

833 F.2d at 227 n.3.

Fortunately, Judge Moore's reasoning did not carry the day in *Grubb*. His dissenting opinion remains the only arguable³ judicial expression of the position that Celotex advocates in the instant proceeding.

Lacking any persuasive support in the decisional law, Celotex is forced to argue that the recent cases holding that supersedeas bonds may not be considered property of the bankruptcy estate are simply wrong. The landmark *Mid-Jersey* case, Celotex explains, was decided before the enactment of the Bankruptcy Code in 1978. The law applicable when *Mid-Jersey* was decided confined the bankruptcy estate to property actually in the debtor's possession; since the bond at issue in the *Mid-Jersey* case

³ The reasoning of the dissent in *Grubb* also appears to hinge on the fact that the debtor secured the judgment (or the promise to pay the judgment) with its own certificates of deposit, rather than with a surety agreement executed by a third party. Had the bond itself simply been an agreement by an unrelated third party to pay the judgment in the event of default, Judge Moore might well have joined the majority. In any event, a bond deposited with the court to secure the obligation to pay a judgment should be not considered the property of the judgment debtor, whether the bond takes the form of a surety agreement or is a negotiable instrument or cash pledged by the debtor itself.

was not in the debtor's possession, the *Mid-Jersey* case may have been correctly decided under the applicable law, Celotex says. But the Bankruptcy Code expanded the concept of the debtor's estate to include all property in which the debtor has an interest, including property possessed by third parties. Celotex Memorandum at 5-6, citing 11 U.S.C. §541; Celotex Memorandum at 9-10. Thus, Celotex argues, the rationale of *Mid-Jersey* no longer applies. The reliance of post-Code cases on *Mid-Jersey* is misplaced, and, Celotex contends, those cases should not be followed.

At least one court has expressly rejected Celotex's argument that the *Mid-Jersey* reasoning did not survive the enactment of the Bankruptcy Code. *W. W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So.2d 1348, 1350 (Fla. 1989). More importantly, Celotex's analysis does not withstand scrutiny, because it is based on the inaccurate premise that the *Mid-Jersey* decision was based exclusively on the debtor's lack of possession. A fair reading of *Mid-Jersey* reveals that the decision was based on the court's recognition that the debtor lacked *any* interest in the bond once the appeal was decided and the judgment affirmed.

Once we have determined that FMI [the debtor] does have an interest in the trust fund, the Chapter XI court would, of course, have jurisdiction over any funds to which the debtor has a rightful claim. At present, however, the Court is able to proceed with determining which party is entitled to receive the trust res and its accumulated interest.

Mid-Jersey, 518 F.2d at 644.

Similarly, in the instant case, as in all the post-Code cases upon which the asbestos personal injury creditors rely. Celotex's "contingent reversionary interest" in the supersedeas bonds is not enough to allow the court to place the supersedeas bonds into the bankruptcy estate. The Court is properly allowing appeals involving Celotex to proceed upon motion, thus allowing Celotex's liabilities to be decided. Once an appeal is concluded, there is no more "contingency;" either Celotex has a right to the return of its bond or it does not. Celotex simply has no property interest in supersedeas bonds or cash deposits that secure judgments which have been affirmed on appeal or are otherwise final.

The asbestos personal injury creditors have shown that the courts have been unanimous in holding that supersedeas bonds or cash deposits are independent obligations and they cannot be considered "property of the debtor" subject to distribution in bankruptcy. The following discussion will illustrate that Celotex has shown the court no legitimate reason to ignore these decisions based upon the peculiar facts involved in this bankruptcy.

B. The Reasons Asserted by Celotex for Holding the Supersedeas Bonds To Be Property of Its Bankruptcy Estate Are Without Merit.

Celotex analogizes the supersedeas bonds posted to secure individual judgments against Celotex to liability insurance generally available to the debtor to satisfy claims against it. It cites several cases supporting the proposition that liability insurance is an asset of the bankruptcy estate, and concludes that supersedeas bonds

may be similarly distributed through a bankruptcy proceeding.

But a supersedeas bonds are not the same as general liability insurance. Most obviously, a supersedeas bond is a precise, liquidated amount deposited in court for the benefit of a particular, identified claimant. In contrast, insurance is available to the insured to satisfy the claims of a class of individuals. More importantly, the judgment creditor is the direct and sole beneficiary of the bond; unlike insurance, the bond is intended to protect the judgment creditor, not the debtor. The successful plaintiff whose judgment has been stayed by the posting of a supersedeas bond is entitled by law or by the rules of court to the protection of such a bond; in contrast, no potential plaintiff is automatically entitled to the protection of insurance coverage owned by the tortfeasor. Finally, if the plaintiff whose judgment has been secured by a supersedeas bond prevails on the underlying claim, release of the bond to the plaintiff is direct and ministerial. See, e.g., Fed.R.Civ.P. 65.1. In contrast, a successful plaintiff's access to insurance proceeds generally is controlled by the insured.

A supersedeas bond, then, is a more specific type of obligation, and provides the judgment creditor with more particularized and direct relief, than general liability insurance. The insurance cases upon which Celotex relies to show that supersedeas bonds are included in the bankruptcy estate are inapposite. Far more relevant are the cases describing the character of supersedeas bonds, which, as described earlier, all hold that supersedeas bonds are not subject to the control of the bankruptcy court.

Celotex then argues that because it obtained the supersedeas bonds by pledging collateral⁴ with the companies that issued the bonds, Celotex is directly affected by release of the bonds to judgment creditors and therefore has a property interest in the bonds. But the asbestos personal injury creditors vigorously dispute the assertion that Celotex is affected even indirectly by permitting judgment creditors to satisfy their claims out of the proceeds of supersedeas bonds. Celotex is affected only if the companies that issued the bonds retain the collateral pledged by Celotex to obtain them. In other words, by allowing judgment creditors to recover on the supersedeas bonds, the court is not allowing the depletion of Celotex's estate; Celotex's estate would be depleted only if the bonding companies refused to return to Celotex the collateral pledged by Celotex to obtain the bonds.

Celotex argues generally that the bonds posted on its behalf may be voidable as preferences or even as fraudulent conveyances. Such determinations, of course, must be made on a case-by-case basis. Typically, it is the creditors rather than the debtor itself that seek to void a transfer as a fraudulent conveyance [sic]; Celotex's suggestion that it was guilty of some type of fraud in permitting a judgment to be entered against it and in bonding

⁴ Celotex notes that this collateral generally took the form of cash or advances on insurance proceeds. Of course, the nature of the collateral, and even the substance of the agreement between Celotex and the surety as a whole, is irrelevant. What is relevant is that Celotex pledged the collateral to the surety, not to the judgment creditors. Celotex's efforts to recover or assert an interest in the collateral should be directed to the surety, not to the judgment creditors.

the judgment is nothing short of astonishing. Celotex cites no examples of bonds that it obtained as a result of fraud, and the asbestos health creditors suggest that the finding of a fraudulent conveyance [sic] does not provide a likely basis for invalidating any of the supersedeas bonds or the judgments upon which the bonds were based.

Finally, Celotex obliquely suggests that to the extent that a supersedeas bond represents liability for punitive damages, it should not be paid to the judgment creditor but should be returned to the estate to satisfy other creditors' claims for compensatory damages. Whether or not a bankruptcy court has the power to discharge claims for punitive damages in a plan of reorganization, it does not have the authority to attach property not within its jurisdiction and use it to satisfy claims against the debtor. As plaintiffs have made clear the supersedeas bonds are not a part of Celotex's estate and therefore cannot be used to fund a plan of reorganization. A judgment creditor's rights against the bonding company that insured the judgment are governed by the bond agreement and by the law governing such agreements, and not by the nature of the underlying judgment. Such rights are independently enforceable, and a bankruptcy court cannot impair them.

III. CONCLUSION

Celotex's desire to recover as much of its property as possible, so as to maximize the assets available to satisfy the claims of all its creditors, is praiseworthy. However, the private property rights of judgment creditors, many

of whom have experienced disabling physical injuries or the death of a spouse or parent as a result of Celotex's tortious conduct, and all of whom were forced to trial by Celotex's refusal to negotiate in good faith, must be respected. Celotex cannot take property that it does not own and use it to satisfy the claims against it. The bonds posted to secure and stay judgments against Celotex simply are not Celotex's property, and cannot be used to fund Celotex's plan of reorganization.

The very purpose of a supersedeas bond is to protect the judgment creditor from the possibility that the judgment debtor will become insolvent during the appeal and become unable to pay the judgment. Adoption of Celotex's position would frustrate [sic] this purpose, and would conflict with every reported decision on the issue.

Fairness to judgment creditors, a common-sense recognition of the purpose of supersedeas bonds, and the overwhelming weight of authority compel the court to conclude that the supersedeas bonds posted in order to stay execution of judgments against Celotex are not part of Celotex's bankruptcy estate. This court should therefore rule that judgment creditors of Celotex may satisfy their judgments by executing on supersedeas bonds posted on behalf of Celotex when the judgments become final.

Respectfully submitted,
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I hereby certify that a true and correct copy of the foregoing Memorandum was mailed this 28th day of February 1991 to the following counsel of record:

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IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF TEXAS
 WICHITA FALLS DIVISION

BENNIE EDWARDS AND	§	
JOANN EDWARDS,	§	
Plaintiffs,	§	
VS.	§	C. A. No.
	§	7-87-0050
THE CELOTEX CORPORATION,	§	
ET AL.,	§	
Defendants.	§	

**SUPPLEMENTAL RESPONSE IN OPPOSITION TO
 MOTION FOR RELEASE OF SUPERSEDEAS BOND**

TO THE HONORABLE UNITED STATES DISTRICT
 JUDGE:

Defendant THE CELOTEX CORPORATION ("Celotex") supplements its Response in Opposition to Motion for Release of Supersedeas Bond to make this Court aware of a decision of the United States Bankruptcy Court for the Middle District of Florida entered on June 13, 1991.

On that date, the Honorable Thomas E. Baynes, Jr., entered an Omnibus Order on Motion to Lift Stay with Regard to Celotex Appeals and Supersedeas Bonds Thereon (the "Omnibus Order"). In the Omnibus Order, Judge Baynes held that any supersedeas bond which is in place to stay execution of a judgment against Celotex remains property of the Celotex bankruptcy estate as long

as the appellate process upon which it is based is proceeding, and that "the automatic stay of Section 362 applied to any action to enforce a judgment against the supersedeas bond." Judge Baynes also held that even after the appellate process is concluded, the judgment creditor is precluded from proceeding against any supersedeas bond without first seeking to vacate Judge Baynes' order enjoining judgment creditors from proceeding against supersedeas bonds pursuant to 11 U.S.C. § 105. (This § 105 order has been presented to the Court as part of Celotex's original response to the present motion.) A true and correct copy of the Omnibus Order is attached hereto as Exhibit A.

Plaintiffs' counsel in this case, the firm of Baron & Budd, P.C., appeared in the proceeding which lead to the entry of the Omnibus Order as one of the counsel for the Asbestos-Related Personal Injury Creditors. As such, the Omnibus Order is binding upon Plaintiffs in this action.

Plaintiffs' Motion for Release of Supersedeas Bond therefore is a violation of both 11 U.S.C. § 362 and of the bankruptcy court's January 10, 1991, order entered under 11 U.S.C. § 105. Any doubt that these violations are occurring has been resolved by the entry of the Omnibus Order. The only action which should be taken at this point which would not be a further violation of the bankruptcy court orders and the automatic stay would be

for this Court to overrule the Motion for Release of Supersedeas Bond.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing has been forwarded to all counsel of record:

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Northbrook Property and
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South Barrington, Illinois 60010
Attn: Surety Bond Dept.

by certified mail, return receipt requested, on this 25th
day of July, 1991.

/s/ Elizabeth M. Thompson
by/Illegible
Elizabeth M. Thompson

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS and
JOANN EDWARDS

Plaintiffs,

vs.

EMPIRE ACE INSULATION
MFG. CORP., ET AL.,

Defendants.

§
§
§
§ CIVIL ACTION
§ NO. CA7-87-050-K
§
§
§
§

JOINT STATUS REPORT

COME NOW Plaintiffs, Defendant Celotex Corporation, the only defendant remaining in this case, and Northbrook Property and Casualty Insurance Co., the surety on the supersedeas bond posted by Defendant Celotex Corporation, and submit their Joint Status Report in accordance with this Court's order of January 14, 1992. The parties respond to the Court's inquiries as follows:

- (1) A brief statement of the nature of the case, including the contentions of the parties;

This case was settled between plaintiffs and all defendants except Celotex Corporation ("Celotex"). The case was tried to a jury in April of 1989. On April 17, 1989, upon the jury's verdict, the court entered judgment in plaintiffs' favor and against Celotex in the amount of \$280,753.80. Upon Celotex's request, Northbrook Property and Casualty Company ("Northbrook"), as surety, joined Celotex in issuing a supersedeas bond in the amount of \$294,097.88

to stay execution of the judgment pending appeal. Celotex appealed the judgment to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment in a reported opinion. *Edwards v. Armstrong World Industries, Inc.*, 911 F.2d 1151 (5th Cir. 1990). Celotex did not file a petition for rehearing, and the Fifth Circuit issued its mandate of affirmance to this court on October 12, 1990. On the same date, Celotex filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida. On October 17, 1990, in response to an emergency motion filed by Celotex, the bankruptcy court entered an order pursuant to §105 of the bankruptcy code enjoining all entities "from commencing or continuing any judicial, administrative or other proceeding involving the Debtors, regardless of who initiated the proceeding, whether the matter is on appeal and a supersedeas bond had been posted by the Debtors, or, the appellant in the appeal was one of the Debtors."

On or about May 3, 1991, plaintiffs filed a motion in this case under Rule 65.1 of the Federal Rules of Civil Procedure, seeking leave of court to enforce the terms of the supersedeas bond posted on behalf of Celotex by Northbrook. Northbrook filed a memorandum in opposition to the motion on or about May 21, 1991, and Celotex filed a response in opposition to the motion on or about May 22, 1991. Celotex and Northbrook took the position that plaintiffs' effort to enforce the supersedeas bond is a preceeding [sic] against the debtor in bankruptcy and against the property of the bankruptcy

estate that the bankruptcy court has the power to enjoin, and that the bankruptcy has enjoined the type of motion asserted by plaintiffs in this case by its order dated October 17, 1990. On June 13, 1991, the bankruptcy court entered its Omnibus Order on Motion To Lift Stay with Regard to Celotex Appeals and To Release Supersedeas Bonds Thereon which held, *inter alia*, (1) a supersedeas bond is property of the estate during the appeal; (2) judgment creditors of Celotex are enjoined from proceeding on any supersedeas bond without first vacating the §105 stay; and (3) the October 17, 1990 §105 stay remained in effect. On July 29, 1991 Celotex filed a supplemental response in opposition to plaintiffs' motion advising the court of this order. On August 5, 1991, the court invited the plaintiffs to reply to Celotex's supplemental response, and plaintiffs did so. Plaintiffs' motion to enforce the supersedeas bond remains pending, and disposition of the motion is the only action that remains for the court in this case.

(2) Any challenge to jurisdiction or venue;

Celotex argues that this proceeding is stayed by operation of 11 U.S.C. §362(a) and by express injunction issued by the bankruptcy court. Celotex and Northbrook take the position that the bankruptcy court is the appropriate and exclusive forum to determine whether the bankruptcy stay should be lifted and that the bankruptcy court has exclusive jurisdiction over the property of the estate pursuant to 28 U.S.C. §1334(a) and 28 U.S.C. §157. Plaintiffs take the position that the bankruptcy court has no jurisdiction to restrain plaintiffs' collection efforts

against third parties such as Northbrook, which is properly before the court under Fed.R.Civ.P. 65.1.

No other challenge to the jurisdiction or venue of this court has been asserted.

- (3) A brief description of all pending motions, including the dates the motions and any responses thereto were filed;

Plaintiffs' Motion for Release of Supersedeas Bond, filed on or about May 3, 1991;

Celotex's Response in Opposition to Motion for Release of Supersedeas Bond, filed on or about May 22, 1991;

Northbrook's Memorandum in Opposition to Motion for Release of Supersedeas Bond filed on or about May 21, 1991;

Celotex's Supplemental Response to Plaintiffs' Motion for Release of Supersedeas Bond, filed July 29, 1991; and

Plaintiffs' Reply to Celotex's Supplemental Response, filed on or about August 20, 1991.

- (4) A brief description of any matters which require a conference with the Court;

Plaintiffs believe that their Motion for Release of Supersedeas Bond may be appropriate for a hearing or conference with the Court. Defendant maintains that any such hearing or conference would violate the automatic stay of 11 U.S.C. §362(a).

- (5) An assessment of the likelihood that other parties will be joined, identities of potential parties and an estimate of the time needed for joinder of such parties;

Not applicable.

- (6) An estimate of the date by which discovery can be completed;

Not applicable.

- (7) Whether a jury has been demanded;

Not applicable.

- (8) Whether the parties will consent to trial (jury or nonjury) before a U.S. Magistrate Judge.

Not applicable.

- (9) (a) An assessment of the prospects for settlement,
(b) The status of any settlement negotiations already conducted, and
(c) The specific date, place and time of a formal settlement conference at which the parties and their counsel shall appear *in person* to discuss settlement of this case;

Not applicable.

- (10) Whether the case is ready for trial and the anticipated length of trial;

Not applicable.

- (11) Any other matters relevant to the status and disposition of this case.

None.

Respectfully submitted,

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[Mr. Millner approved the
substance of this Report but did
not review and approve the final
draft].

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Status Report has been circulated to all counsel of record by telecopier and by regular mail on this 3rd day of February, 1992.

/s/ Brent M. Rosenthal
BRENT M. ROSENTHAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS AND	§	
JOANN EDWARDS,	§	
	§	C. A. No.
Plaintiffs,	§	7-87-0050
	§	
VS.	§	
	§	
THE CELOTEX CORPORATION,	§	
ET AL.,	§	
	§	
Defendants.	§	

NOTICE OF APPEAL

Notice is hereby given that The Celotex Corporation, Defendant, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order authorizing the execution and the supersedeas bond that was entered in this action on the 27th day of May, 1992.

DATED: June 25, 1992

Respectfully submitted,

BUTLER & BINION, A Registered
Limited Liability Partnership

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to all counsel of record:

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Northbrook Property and
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Attn: Surety Bond Dept.

by certified mail, return receipt requested, on this 25th day of June, 1992.

/s/ Kevin F. Risley
Kevin F. Risley

SUPREME COURT OF THE UNITED STATES

No. 93-1504

Celotex Corporation,

Petitioners

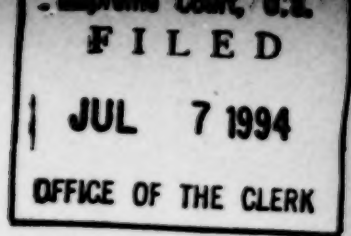
v.

Bennie Edwards, et ux.

ORDER ALLOWING CERTIORARI. Filed May 23, 1994.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted limited to the following question: "Whether Rule 65.1 of the Federal Rules of Civil Procedure allows enforcement of a supersedeas bond, posted to stay execution of judgment against a defendant that filed for reorganization after the judgment became final, against the non-bankrupt surety that issued the bond, even though a bankruptcy court in another circuit has attempted to restrain execution on supersedeas bonds posted in favor of the debtor under section 105(a) of the Bankruptcy Code."

May 23, 1994



(4)
No. 93-1504

**In The
Supreme Court of the United States
October Term, 1993**

THE CELOTEX CORPORATION,

Petitioner,

v.

BENNIE EDWARDS and JOANN EDWARDS,

Respondents.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether Rule 65.1 of the Federal Rules of Civil Procedure allows enforcement of a supersedeas bond, posted to stay execution of judgment against a defendant that filed for reorganization after the judgment became final, against the non-bankrupt surety that issued the bond, even though a bankruptcy court in another circuit has attempted to restrain execution on supersedeas bonds posted in favor of the debtor under section 105(a) of the Bankruptcy Code?

LIST OF PARTIES TO THE PROCEEDING

The parties to the proceeding below are identified in the caption of the case. The Celotex Corporation is wholly-owned by Jim Walter Corporation, and Celotex has a wholly-owned subsidiary, Carey Canada Inc. Although not formally named as a party in the proceeding below, Northbrook Property and Casualty Insurance Company has an interest in the outcome of this case because Northbrook is the surety on the supersedeas bond at issue here.

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BRIEF FOR PETITIONER

Celotex respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit, which failed to defer to the injunction issued by the United States Bankruptcy Court for the Middle District of Florida pursuant to 11 U.S.C. §105(a). That injunction stayed respondents Bennie and JoAnn Edwards from collecting their judgment against Celotex by executing upon the supersedeas bond procured by Celotex.

CITATION OF THE OPINIONS AND JUDGMENTS
DELIVERED IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, permitting the Edwardses to collect their judgment against Celotex by executing upon the supersedeas bond that Celotex posted in the United States District Court for the Northern District of Texas, is reported. *See Edwards v. Armstrong World Indus., Inc.*, 6 F.3d 312 (1993).

After the Fifth Circuit's ruling, Celotex filed a timely petition for rehearing containing a suggestion for rehearing *en banc*. The Fifth Circuit's explanation of why it denied Celotex's rehearing petition is reported. *See Edwards v. Armstrong World Indus., Inc.*, 6 F.3d 321 (1993) (per curiam) (statement on denial of petition for rehearing and suggestion for rehearing *en banc*).

The order of the United States District Court for the Northern District of Texas granting the Edwardses' motion for leave to execute upon Celotex's supersedeas bond is not reported. The text of the order is reproduced in the Appendix to Celotex's Petition for a Writ of Certiorari. *See App. to Pet. for Cert.* 23.

GROUND ON WHICH THIS COURT'S JURISDICTION IS INVOKED

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §1254(1).

The Fifth Circuit issued its judgment on November 5, 1993. Thereafter, Celotex filed a timely petition for rehearing containing a suggestion for rehearing *en banc*. The Fifth Circuit denied Celotex's petition for rehearing and refused Celotex's suggestion for rehearing *en banc* on December 22, 1993.

On March 22, 1994, Celotex filed its petition for a writ of certiorari in this Court. This Court granted Celotex's petition for a writ of certiorari on May 23, 1994.

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED

U.S. Const. Art. I, §8, cl. 4: "The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

11 U.S.C. §105(a): "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

11 U.S.C. §510(c): "[A]fter notice and a hearing, the court may – (1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or (2) order that any lien securing such a subordinated claim be transferred to the estate."

28 U.S.C. §157(a): "Each district court may provide that any or all cases under title 11 and any

or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."

28 U.S.C. §158(a): "The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving."

28 U.S.C. §158(d): "The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section."

28 U.S.C. §1334(b): "Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."

28 U.S.C. §2072(a): "The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts"

28 U.S.C. §2072(b): "Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

Fed. R. Civ. P. 62(d): "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay. . . . The bond may be given at or

after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court."

Fed. R. Civ. P. 65.1: "Whenever these rules, including the Supplemental Rules for Certain Admiralty and Maritime Claims, require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known."

Fed. R. Bankr. P. 7004(d): "The summons and complaint and all other process except a subpoena may be served anywhere in the United States."

STATEMENT OF THE CASE

On October 12, 1990, Celotex and its wholly-owned subsidiary, Carey Canada Inc., filed voluntary petitions in bankruptcy for reorganization under Chapter 11 of Title 11, United States Code, in the United States Bankruptcy Court for the Middle District of Florida. See *In re Celotex Corp.*, 128 B.R. 478, 479 (Bankr. M.D. Fla. 1991) (*Celotex I*). Both cases remain pending.

The principal reason why Celotex sought bankruptcy protection was the vast liability that it faced in numerous

bodily injury and property damage suits involving asbestos. Courts have imposed asbestos-related liability upon Celotex as the result of its merger in 1972 with Panacon Corporation, a successor to Philip Carey Corporation. Philip Carey had been a manufacturer of asbestos-containing insulation products.

The question before this Court arises from the interaction, and resulting friction, between the Edwardses' civil tort action against Celotex, instituted in a United States District Court in Texas, and Celotex's bankruptcy case in Florida.

A. The Liability Phase Of The Edwardses' Civil Action

The Edwardses' suit against Celotex illustrates the type of problems that Celotex faced when it filed for relief under the Bankruptcy Code. On August 17, 1987, the Edwardses filed suit in the United States District Court for the Northern District of Texas against Celotex and seventeen other defendants. Jt. App. 1. Bennie Edwards was a former insulation installer who claimed in his complaint to have an asbestos-related injury. See *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151, 1153 (CA5 1990) (*Edwards I*).

In mid-April of 1989, following a five-day trial, the jury returned a verdict in favor of the Edwardses and against Celotex. The jury found that Celotex was liable to the Edwardses for a total of \$35,253.80 in compensatory damages.¹ Jt. App. 1. The jury also awarded the Edwardses \$245,500.00 in punitive damages. *Id.* The jury

¹ More precisely, the jury awarded Bennie Edwards \$10,195.60 in "past damages" and \$14,288.20 in "future damages." The jury awarded JoAnn Edwards \$3,590.00 in "past damages" and \$7,180.00 in "future damages." See App. to Pet. for Cert. 24-25.

did so even though Celotex, itself, never sold or manufactured the asbestos-containing products that allegedly caused injury to the Edwardses.

The Texas district court entered judgment on the jury's verdict on April 17, 1989. *Id.* On June 1, 1989, the district court entered an order denying the post-judgment motion that Celotex had filed. Five days later, on June 6, 1989, the district court granted Celotex's motion pursuant to Federal Rule of Civil Procedure 62(d) to provide a supersedeas bond pending appeal. A bond in the amount of \$294,987.88 was thereafter provided. *Jt. App.* 1-2. Northbrook served as surety on the bond. *Id.* Celotex secured its reimbursement obligation to Northbrook (should Northbrook ever be required to pay on the bond) with Celotex's property, in the form of cash payable to Celotex from Northbrook under a settlement agreement resolving insurance coverage disputes. *Edwards v. Armstrong World Indus., Inc.*, 6 F.3d 312, 314 (CA5 1993) (*Edwards II*).

After procuring the supersedeas bond, Celotex appealed from the judgment to the United States Court of Appeals for the Fifth Circuit. *Jt. App.* 2. On September 20, 1990, the Fifth Circuit affirmed the judgment, expressing misgivings as to the propriety of serial punitive damage awards in mass tort litigation. *Edwards I*, 911 F.2d at 1155. The Fifth Circuit's concerns in this regard were prophetic:

"Celotex[']s . . . affidavits reflect[] that between September, 1988 and March, 1989, judgments for punitive damages exceeding \$10 million were entered against it, compared with \$15 million in adverse actual damage judgments. If no change occurs in our tort or constitutional law, the time will arrive when Celotex's liability for punitive damages imperils its ability to pay compensatory claims and its corporate existence. Neither the company's innocent shareholders, employees and creditors, nor future asbestos

claimants will benefit from this death by attrition.

"With our own misgivings, we AFFIRM." *Id.*

Celotex did not file a petition for rehearing of the Fifth Circuit's decision. *Edwards II*, 6 F.3d at 314. As a result, on October 12, 1990, the Fifth Circuit issued its mandate in the tort action. *Id.*

B. The Proceedings In The Bankruptcy Court And The Collection Efforts Of The Edwardses

1. The origins of the 11 U.S.C. §105(a) stay

On October 12, 1990, the time foreseen by the Fifth Circuit in *Edwards I* arrived. On that date, the same day that the Fifth Circuit issued its mandate, Celotex filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. *See Celotex I*, 128 B.R. at 479.²

On October 17, 1990, the Florida bankruptcy court issued an order entitled "Order Granting Emergency Motion for Determination of Applicability of §362 Stay of Pending Matters or, in the Alternative, for Extension of §362 Stay to Pending Matters." *App. to Pet. for Cert.* 26-29. Relying expressly upon its powers under 11 U.S.C. §105(a), the bankruptcy court decreed in its order:

"2. All persons (including individuals, partnerships and corporations, and all those acting for or on their behalf), and all governmental units . . . (collectively, 'Entities') be and each of

² Celotex believes the issuance of the mandate on October 12, 1990 occurred before Celotex filed its bankruptcy petition at 3:45 p.m. on that date. The order of these acts, however, is not material to the question presented. The bankruptcy court, without objection by Celotex, would modify the automatic stay under 11 U.S.C. §362(a), as it has consistently done, to permit any necessary conclusion of the *Edwards I* appeal. *See Celotex I*, 128 B.R. at 481 n.9.

them are hereby stayed, restrained and enjoined from:

"f. Taking any act to collect, assess, or recover a claim against any of the Debtors that arose before the commencement of the Chapter 11 cases; . . .

"3. Notwithstanding any exceptions or limitations to the automatic stay contained in §362(b) of the code, all entities are hereby jointly and severally stayed, restrained and enjoined from commencing or continuing any judicial, administrative or other proceeding involving any of the Debtors regardless of (a) who initiated the proceeding, (b) whether the matter is on appeal and a supersedeas bond has been posted by the Debtors or (c) the appellant in an appeal is one of the Debtors.

"4. On request of a party in interest, and after not less than thirty (30) days' written notice to the attorneys for the Debtors, and after a hearing, this Court may consider granting relief from the restraints imposed herein in the event that it be deemed necessary, appropriate and warranted to so terminate, annul, modify or condition the injunctive relief granted herein." *In re Celotex Corp.*, Nos. 90-10016-8B1 & 90-10017-8B1 (Bankr. M.D. Fla. 1990) (order dated Oct. 17, 1990) (reprinted in App. to Pet. for Cert. 26-29).

2. The initial efforts to dissolve the §105(a) stay

After the bankruptcy court issued its §105(a) stay, lawyers representing the Edwardses and other asbestos bodily injury creditors appeared in the Florida bankruptcy court to request that the §105(a) stay be lifted to

permit execution upon supersedeas bonds that Celotex had posted. The Edwardses' lawyers argued to the bankruptcy court, in a brief filed on February 28, 1991, that Celotex's supersedeas bonds were not property of Celotex's bankruptcy estate and thus were not subject to the bankruptcy court's control. See Jt. App. 35-52 (Memorandum of Counsel for Asbestos-Related Personal Injury Creditors Regarding the Status of Supersedeas Bonds).

The bankruptcy court faced a formidable task in resolving the parties' conflict. The Edwardses and the beneficiaries of over 100 other supersedeas bonds demanded unrestricted payment in full. *Celotex I*, 128 B.R. at 479, 482. Conversely, Celotex, on behalf of unbonded creditors, asserted that there was a need to preserve the status quo with respect to the supersedeas bonds until the bankruptcy court could properly address a number of important debtor-creditor issues directly affecting over 100,000 unbonded creditors with asbestos related claims virtually identical to that of the Edwardses. *Id.* at 479, 482-84. Among the issues to be resolved by the bankruptcy court are: whether some or all of the transfers of assets to procure supersedeas bonds can ultimately be set aside as preferences, see 11 U.S.C. §547; whether some or all of the transfers of assets to procure supersedeas bonds can be set aside as fraudulent transfers under state or federal law, see 11 U.S.C. §§544, 548; whether some or all of the settlement agreements that Celotex entered into with its insurers, which led to the provision of the supersedeas bonds, can be rejected as executory contracts, see 11 U.S.C. §365; and whether some or all of the punitive damage awards returned against Celotex can be subordinated or disallowed, see 11 U.S.C. §§510(c), 726(a)(4), 1129(a)(7).³ *Celotex I*, 128 B.R. at 484.

³ The issue of whether bonded punitive damage claims will ultimately be subordinated is particularly significant in this

The significance of these issues to Celotex's creditors, and the bankruptcy case as a whole, cannot be overlooked. If the bonded judgment creditors' interests are not avoided, subordinated or disallowed, this small group, which includes the Edwardses, will collect 100% of their claims, totaling approximately \$70,000,000, *Celotex I*, 128 B.R. at 482, including all punitive damages awarded. Accordingly, no portion of this money would be available for asbestos judgment creditors without bonds, known asbestos bodily injury creditors and countless unknown future asbestos bodily injury creditors. These creditors probably will collect only a small fraction of their compensatory claims – and no punitive damages.

The bankruptcy court was required to weigh and balance these competing claims to limited resources. It also had to weigh the effect that allowing immediate execution would have on the successful completion of Celotex's efforts to reorganize its financial affairs, including, *inter alia*, the resolution of insurance coverage disputes with its insurers. Some of these insurers (like Northbrook) were also liable on Celotex's supersedeas bonds and had secured their liability with cash payable from the insurer to Celotex pursuant to settlement agreements. *Id.* at 480. These settlement agreements resolved disputes relating to coverage for asbestos claims under liability policies. This further complicated the bankruptcy court's difficult balancing task.

3. The May 3, 1991 filing of the Edwardses' Rule 65.1 motion in the Texas court

Apparently dissatisfied with how efforts to dissolve the §105(a) stay were proceeding in the Florida bankruptcy court, on May 3, 1991 the Edwardses filed a motion in the

case. As the Fifth Circuit correctly noted in *Edwards I*, "Celotex's liability for punitive damages imperils its ability to pay compensatory claims." 911 F.2d at 1155.

Texas district court, pursuant to Rule 65.1, seeking to collect their judgment against Celotex by executing upon the supersedeas bond posted by Celotex. *Jt. App.* 2, 5-8. The Edwardses filed this motion without leave of the bankruptcy court and without awaiting the bankruptcy court's ruling on the efforts to dissolve the §105(a) stay. In the Rule 65.1 motion, the attorneys for the Edwardses made the same argument they had made in the bankruptcy court, namely that Celotex's supersedeas bonds were not property of Celotex's bankruptcy estate and thus were not subject to the bankruptcy court's control. *Jt. App.* at 5-8. Celotex opposed the Edwardses' motion. *Id.* at 3. Northbrook, as surety, also appeared in the district court and opposed the motion. *Id.* at 2-3, 28-34.

4. The bankruptcy court's June 13, 1991 decision and order regarding the supersedeas bonds

On June 13, 1991, after extensive briefing and oral argument, *Celotex I*, 128 B.R. at 479 n.1., the Florida bankruptcy court issued its opinion and order concerning the supersedeas bonds. The bankruptcy court ruled that judgment creditors who were in the position of the Edwardses – having prevailed on appeal and being the beneficiaries of a supersedeas bond – would not be permitted to execute upon those bonds without first obtaining permission from the bankruptcy court. *Id.* at 484-85. The bankruptcy court decreed:

"(3) Where at the time of filing the petition, the appellate process between Debtor and the judgment creditor had been concluded, the judgment creditor is precluded from proceeding against any supersedeas bond posted by Debtor without first seeking to vacate the Section 105 stay entered by this Court. It is further

"

"ORDERED, ADJUDGED AND DECREED the Section 105 stay entered by this Court on October 17, 1990, continues in effect." *Id.* at 485.

In explaining the reasons supporting its ruling, the bankruptcy court commented first upon the §105(a) stay entered on October 17, 1990:

"Upon Debtor's filing its bankruptcy petition, this Court entered an order pursuant to Section 105 which sought to augment the stay protection afforded by Section 362(a). Such order was upon Debtor's motion and was for the purpose of precluding, among other things, judgment creditors from proceeding in various state and federal courts against supersedeas bonds without first coming before this Court." *Celotex I*, 128 B.R. at 482 (footnote omitted).

After reviewing several decisions from various United States Courts of Appeals upholding the use of 11 U.S.C. §105(a) injunctions to stay actions that threatened to impede the reorganization process, *see Celotex I*, 128 B.R. at 483-84, the bankruptcy court wrote:

"These decisions reinforce fundamental bankruptcy policy to stop ongoing litigation and to prevent peripheral court decisions from dealing with issues, properties, or entities involved in a debtor's reorganization process without first allowing the bankruptcy court to have an opportunity to review the potential effect on the debtor. Where bankruptcy courts in 'mega' cases such as this case are required to deal with complex litigation involving numerous parties, joint and several liability, and multi-million dollars in claims and assets, not to mention potential conflicts with other judicial determinations, the powers of the bankruptcy court under Section 105 must in the initial stage be absolute, unless limited by the Bankruptcy Code or other federal laws. Clearly, the role of Section 105 in this type

of case is first to protect the reorganization process." *Id.* at 484.

In concluding its opinion, the bankruptcy court stated:

"As to the utilization of Section 105 vis-a-vis the supersedeas bonds, once the judgment creditor has been successful throughout the appellate process, the judgment creditor is not able to proceed against the supersedeas bond without seeking to vacate the Section 105 stay in this Court. Under these circumstances, it will be Debtor's burden to establish that the Section 105 stay should continue. The Court's inquiry will include Debtor's ability to avoid any final judgment under the Bankruptcy Code and the necessity to protect its sureties or disenfranchise them if such surety agreements can be considered executory contracts or avoided under the avoiding powers in the Bankruptcy Code. (11 U.S.C. §§365, 547, and 548.) Additionally, consideration will be given to Debtor's ability to deal with the targeted litigation within the reorganization plan and the effect on that process if the Section 105 stay is extinguished. The analysis may also include the treatment of those judgments which include punitive damages or joint and several liability or contribution with other asbestos co-defendants. This Court does not seek to establish an exhaustive list of inquiry, as each specter of the Section 105 stay may relate differently to an aspect of Debtor's reorganization process which seeks to be protected." *Id.* (footnote omitted).⁴

⁴ In the omitted footnote, the bankruptcy court addressed the issue of punitive damage awards that had been returned against Celotex:

"Section 726(a)(4) of the Bankruptcy Code provides that punitive damages are fourth in line for distribution in a Chapter

5. The Texas court's May 27, 1992 decision upon the Rule 65.1 motion

After issuance of *Celotex I* on June 13, 1991, Celotex promptly brought that decision and order to the attention of the Texas district court in a supplemental brief. Jt. App. 3, 53-56. Celotex also alerted the Texas district court to the involvement of the Edwardses' counsel in the proceedings leading up to the issuance of the decision and order:

"Plaintiffs' counsel in this case, the firm of Baron & Budd, P.C., appeared in the proceeding which lead to the entry of the Omnibus Order [*Celotex I*] as one of the counsel for the Asbestos-Related Personal Injury Creditors. As such, the Omnibus Order is binding upon Plaintiffs in this action." Jt. App. 54

Nearly a year later, on May 27, 1992, the Texas district court issued an order, without opinion, granting the Edwardses leave to execute upon the supersedeas bond that Celotex had posted. Jt. App. 3. The order stated, in full:

"CAME ON TO BE HEARD plaintiffs' Motion for Release of Supersedeas Bond, and the court, being advised of the premises, is of the opinion that said motion has merit and should be granted. It is therefore

7 liquidation. Although Section 726(a)(4) is inapplicable to Chapter 11 reorganizations (*In re A.H. Robins Co.*, 89 B.R. 555, 560 (E.D. Va. 1988); *In re Alwan Bros.*, 115 B.R. 148, 151 (Bankr. C.D. Ill. 1990)), it is well-established that bankruptcy courts have inherent equitable power to disallow, limit, or subordinate claims for punitive damages in Chapter 11 reorganizations. *In re A.H. Robins Co.*, 89 B.R. at 562; *In re Apex Oil Co.*, 118 B.R. 683, 699 (Bankr. E.D. Mo. 1990); *In re Johns-Manville Corp.*, 68 B.R. 618, 627 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987)." *Celotex I*, 128 B.R. at 484 n.12.

"ORDERED that plaintiffs may execute on the supersedeas bond executed by Northbrook Property and Casualty Insurance Company on May 17, 1989 to secure the judgment entered in plaintiffs' favor against the Celotex Corporation in the above styled and numbered cause." *Edwards v. Celotex Corp.*, No. 7-87-0050 (N.D. Tex. May 27, 1992) (order) (reprinted in App. to Pet. for Cert. 23).

6. The bankruptcy court's May 29, 1992 decision on the subsequent efforts to lift the §105(a) stay

On May 29, 1992, just two days after the date of the Texas district court's order, the Florida bankruptcy court decided motions filed by several other bonded judgment creditors who had prevailed against Celotex on appeal. *In re Celotex Corp.*, 140 B.R. 912 (Bankr. M.D. Fla. 1992) (*Celotex II*). In their motions, these judgment creditors sought relief from the bankruptcy court's §105(a) stay in order to collect their judgments against Celotex. The bankruptcy court held full evidentiary hearings on these motions. Evidence was presented as to, *inter alia*, (a) the financial status of Celotex when the supersedeas bonds were procured, (b) how the supersedeas bonds were procured, (c) the nature of the arrangements and transactions between Celotex and the various sureties, including the transfer of collateral to the sureties to secure Celotex's reimbursement obligations under the supersedeas bonds, (d) the number of bonded asbestos judgments, (e) the number of asbestos claimants who had filed suits prior to those of the bonded asbestos claimants, (f) the available established insurance coverage for asbestos claims and other assets generally available to satisfy unbonded creditors, and (g) the effect on the reorganization effort of allowing execution. *Celotex II*, 140 B.R. at 914.

The bankruptcy court refused to lift the §105(a) stay at that time, reasoning that Celotex would suffer irreparable harm:

"Debtor, in all instances, has collateralized the supersedeas bonds. The collateral has taken various forms, but one type in particular is illustrative of the linkage associated with irreparable harm. Debtor and many of its insurers on asbestos claims have settled long-ongoing disputes over insurance coverage. Some of these settlement agreements established the maximum amount of insurance coverage, provided for payment to Debtor of these coverage amounts over time, and provided such payments and contract rights could be held by the insurance company as collateral for supersedeas bonds issued on behalf of Debtor in some of the asbestos cases. . . .

"Dissolving the Section 105 stay would merely shift the battleground: if the Section 105 stay were lifted to enable the judgment creditors to reach the sureties, the sureties in turn would seek to lift the Section 105 stay to reach Debtor's collateral, with corresponding actions by Debtor to preserve its rights under the settlement agreements. Such a scenario could completely destroy any chance of resolving the prolonged insurance coverage disputes currently being adjudicated in this Court. The settlement of the insurance coverage disputes with all of Debtor's insurers may well be the linchpin of Debtor's formulation of a feasible plan. Absent the confirmation of a feasible plan, Debtor may be liquidated or cease to exist after a carrion feast by the victors in a race to the courthouse." *Celotex II*, 140 B.R. at 914-15 (footnote omitted).

In denying the motions of these judgment creditors for leave to execute upon Celotex's supersedeas bonds,

the bankruptcy court again balanced the competing interests of the bonded judgment creditors, such as the Edwardses, with the interests of unbonded asbestos bodily injury claimants. *Id.* at 915-17.

To maintain the status quo, the bankruptcy court directed Celotex to establish a reserve account to ensure that, in the event Celotex was unsuccessful in efforts to recover the assets related to the supersedeas bonds, the bonded judgment creditor plaintiffs, such as the Edwardses, would not be harmed either by a depletion of estate assets or by delay in execution against the sureties. *Id.* at 917. Celotex has complied with the bankruptcy court's order to provide this additional protection.

The bankruptcy court also directed Celotex to file "any preference action or any fraudulent transfer action or any other action to avoid or subordinate any judgment creditor's claim against any judgment creditor or against any surety within 60 days of the entry of this Order." *Id.* Celotex filed such an action and the bankruptcy court against the Edwardses, 227 similarly situated bonded judgment creditors in over 100 cases and the entities from which Celotex procured its supersedeas bonds. *See Celotex, et al. v. Allstate Ins. Co., et al.*, Adversary No. 92-584 (Bankr. M.D. Fla.). This proceeding is pending and will resolve the avoidance, subordination and disallowance issues which necessitated the §105(a) stay – unless that process is mooted by collection of judgments against Celotex by execution on the supersedeas bonds in violation of the stay.

7. The appeal from the Texas court's order granting the Rule 65.1 motion

On June 26, 1992, Celotex filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit

from the Texas district court's May 27, 1992 order allowing the Edwardses to execute upon Celotex's supersedeas bond. *Jt. App.* 3-4, 64-65.

On November 5, 1993, the Fifth Circuit affirmed. *Edwards II*, 6 F.3d 312. The Fifth Circuit saw its task on appeal as follows:

"It is this Court's duty to insure that the case management tools the bankruptcy court utilizes to control these conflicts do not overwhelm its primary obligation to dispense justice." *Id.* at 314.

The court began by examining whether the Texas district court had jurisdiction to determine the "applicability" of the bankruptcy court's stay. *Id.* at 315. The Fifth Circuit answered this question in the affirmative. *Id.* at 315-16.⁵ The Fifth Circuit subsequently addressed what it described as "the more difficult issue raised by this appeal," "whether the equitable powers granted bankruptcy courts apply to the type of non-debtor third parties present here." *Id.* at 317.

The court proceeded to engage in a lengthy analysis of the merits of the bankruptcy court's §105(a) injunction. *See* 6 F.3d at 317-20. It recognized that "[s]ection 105 authorizes a bankruptcy court to enjoin litigants from pursuing actions pending in other courts that threaten the integrity of a bankrupt's estate." *Id.* at 320. Nevertheless, the Fifth Circuit disagreed with the merits of the particular §105(a) stay at issue, holding that "the integrity of the estate is not implicated in the present case because the debtor has no present or future interest in this supersedeas bond." 6 F.3d at 320 (footnote omitted).

⁵ The Fifth Circuit also considered whether the automatic stay, 11 U.S.C. §362, prohibited the Edwardses from executing upon Celotex's supersedeas bond. The Fifth Circuit held that the automatic stay did not bar execution. *Edwards II*, 6 F.3d at 316-17.

In explaining further its reasons for refusing to defer to the bankruptcy court's §105(a) injunction, the Fifth Circuit wrote:

"The Edwards were specifically promised by the court and by Celotex that they could look to the supersedeas bonds if they won on appeal and we should be careful to see that their expectations are not nullified because of a generalized and theoretical concern for the bankrupt's estate." 6 F.3d at 320.

Accordingly, the Fifth Circuit affirmed the district court's order permitting the Edwardses to execute on Celotex's supersedeas bond – despite the bankruptcy court's §105(a) injunction barring the Edwardses from doing just that.

Thereafter, Celotex filed a petition for rehearing and a suggestion for rehearing *en banc* in the Fifth Circuit. *Jt. App.* 4. In a published per curiam opinion denying Celotex's rehearing petition, the Fifth Circuit wrote:

"Appellants contend that we should not collaterally attack an order of a bankruptcy court sitting under the jurisdiction of the Eleventh Circuit. This contention fails for two reasons. Primarily, the bankruptcy court's order does not purport to reach the proceedings in this case and therefore executing the supersedeas bond does not infringe on the Eleventh Circuit's proper jurisdiction. Secondarily, our opinion merely declares this court's power to protect and preserve supersedeas bonds posted in our district courts. Thus, we have not held that the bankruptcy court in Florida was necessarily wrong; we have only concluded that the district court, over which we do have jurisdiction, was right." 6 F.3d at 321 (per curiam) (statement on denial of petition for rehearing and suggestion for rehearing *en banc*).

On March 22, 1994, Celotex filed a petition for a writ of certiorari seeking review of the Fifth Circuit's ruling in

Edwards II. The petition explained that the Fifth Circuit's decision in *Edwards II*, refusing deference to the Florida bankruptcy court's order, was in direct conflict with the decision of the United States Court of Appeals for the Fourth Circuit in *Willis v. Celotex Corp.*, 978 F.2d 146 (1992), *cert. denied*, 113 S. Ct. 1846 (1993).

In *Willis*, the Fourth Circuit vacated an order of the United States District Court for the Eastern District of Virginia which had permitted execution upon a supersedeas bond posted by Celotex. *Id.* at 150. The Fourth Circuit directed Celotex's bonded judgment creditors to seek permission to execute on Celotex's supersedeas bond from the Florida bankruptcy court as required by the bankruptcy court's §105(a) stay. *Willis*, 978 F.2d at 149-50.

On May 23, 1994, this Court granted Celotex's petition for a writ of certiorari. *Jt. App.* 66.

SUMMARY OF THE ARGUMENT

The judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

This Court has repeatedly held that persons who are subject to the commands of an injunctive order must obey those commands unless and until the order is modified by the issuing court or reversed on appeal therefrom, notwithstanding the existence of eminently reasonable and proper objections to the merits of the order.

Here, the Fifth Circuit utterly disregarded these holdings when it permitted respondents Bennie and JoAnn Edwards to prevail in their Rule 65.1 motion filed in the United States District Court for the Northern District of Texas. That motion constituted a collateral attack upon the interim 11 U.S.C. §105(a) injunction issued by the United States Bankruptcy Court for the Middle District of Florida staying collection of judgments against Celotex

by execution against Celotex's supersedeas bonds in courts throughout the nation.

In enacting 11 U.S.C. §105(a), Congress expressly granted bankruptcy courts the power to issue injunctions where necessary or appropriate. Once Celotex filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the Middle District of Florida, the bankruptcy court in that district had subject matter jurisdiction to issue §105(a) injunctions deemed necessary or appropriate to protect Celotex's reorganization and the property of Celotex's bankruptcy estate.

The particular §105(a) injunction at issue prohibits the Edwardses from collecting their judgment against Celotex by executing upon Celotex's supersedeas bond. The Edwardses are not without recourse, however, as the supersedeas bond remains on file, intact, in the Texas district court. Moreover, the Edwardses and other similarly situated judgment creditors may seek relief from the §105(a) injunction in the Florida bankruptcy court.

Under the circumstances, both the Texas district court and the Fifth Circuit departed radically from the accepted and usual course of judicial proceedings when they reviewed the merits of the Florida bankruptcy court's §105(a) injunction and, believing the injunction to lack merit, permitted the Edwardses to disobey the injunction. Instead, the Texas district court and the Fifth Circuit should have instructed the Edwardses to seek relief from the §105(a) injunction in the bankruptcy court. Only the Florida bankruptcy court and the courts to which appeals may be taken therefrom are empowered to pass upon the necessity and propriety of the particular §105(a) injunction at issue, lest chaos be invited.

Federal Rule of Civil Procedure 65.1 does not, and indeed cannot, authorize the Texas district court to permit the Edwardses to violate the Florida bankruptcy court's binding §105(a) injunction. Rule 65.1, which

merely provides a streamlined procedure by which judgment creditors may recover against sureties, cannot be read to allow recovery against a surety where such recovery is prohibited by an injunction issued by another federal court. Rule 65.1 does not permit a district court, presented with a collateral attack, to override the injunction-issuing authority that Congress vested in the bankruptcy courts when it enacted 11 U.S.C. §105(a). Indeed, Rule 65.1 only answers the question of how, not if or when, a judgment creditor may recover against a surety bond. The Edwardses may properly resort to Rule 65.1 if the Florida bankruptcy court permits them to execute upon Celotex's supersedeas bond.

The record before the Texas district court and the Fifth Circuit was, as is typically the case in a collateral attack, inadequate to allow an informed decision on the merits. However, if this Court determines it is appropriate to review the §105(a) order on its merits by means of this collateral attack, this Court should conclude that the bankruptcy court did not abuse its discretion in issuing the §105(a) stay.

The bankruptcy court acted within its jurisdiction and discretion in determining that Celotex's reorganization would be substantially impeded if judgment creditors such as the Edwardses were permitted to recover against surety bonds, secured by property of Celotex's bankruptcy estate, without first obtaining permission from the bankruptcy court.

For these reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

ARGUMENT

I. THE FIFTH CIRCUIT ERRED IN ALLOWING THE EDWARDSSES TO SUCCEED IN A COLLATERAL ATTACK UPON THE BANKRUPTCY COURT'S 11 U.S.C. §105(a) INJUNCTION

A. The Fifth Circuit Should Have Required The Edwardses To Pursue Their Remedies In The Bankruptcy Court

1. Injunctions may not be collaterally attacked except in certain rare instances, none of which is suggested on this record and none of which was found to exist by either the Texas court or the Fifth Circuit

The Florida bankruptcy court's 11 U.S.C. §105(a) injunction stayed the Edwardses and all other similarly situated judgment creditors from collecting their judgments against Celotex by execution upon Celotex's supersedeas bonds. The Edwardses agree that the injunction "was intended to, and did, enjoin collection attempts like those made by the Edwards against Northbrook in this case." Brief in Opposition at 6 n.2. It is also undisputed that when the Texas district court permitted the Edwardses to execute upon Celotex's supersedeas bond, the court allowed them to succeed in a collateral attack upon the §105(a) injunction issued by the bankruptcy court. See Brief in Opposition at 6 ("The Edwards agree with Petitioners Celotex and Northbrook that the Fifth Circuit's decision in this case upholds a collateral attack on a stay order issued by a bankruptcy judge in another circuit.").

This Court has repeatedly held that injunctive orders are not subject to collateral attack except in certain limited instances, none of which is even suggested in this case. In *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 386 (1980), this Court reiterated

"the established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." See also *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922).

In *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 439-40 (1976), this Court stated that "those who are subject to the commands of an injunctive order must obey those commands, notwithstanding eminently reasonable and proper objections to the order, until it is modified or reversed." The Florida bankruptcy court's §105(a) injunction staying execution upon supersedeas bonds provided by Celotex has not been modified or reversed, yet neither the Fifth Circuit nor the Texas district court required the Edwardses to abide by the terms of the stay.

This Court has specifically applied the general prohibition against collateral attacks to the orders of federal courts exercising bankruptcy jurisdiction.

In *Steelman v. All Continent Corp.*, 301 U.S. 278 (1937), a unanimous Court, speaking through Justice Cardozo, held that an injunction issued pursuant to §2a(15) of the former Bankruptcy Act properly precluded the institution and maintenance in another forum of a separate civil action that would impair the conduct of the bankruptcy case and the jurisdiction of the bankruptcy court. This Court in *Steelman* thus upheld the bankruptcy court's §2a(15) injunction in the face of a collateral attack. Section 2a(15) of the Bankruptcy Act was the predecessor of §105(a) of the Bankruptcy Code.⁶ If injunctions issued

⁶ In §105(a) of the Bankruptcy Code, Congress conferred upon bankruptcy courts even broader power than had been conferred under §2a(15) of the Bankruptcy Act:

"Section 105 is much broader than Section 2a(15), and constitutes a major departure from that law in that it is in no way circumscribed by possession or custody of a *res*. Unlike the

pursuant to §2a(15) of the Bankruptcy Act were immune from collateral attack, it follows that injunctions issued pursuant to §105(a) of the Bankruptcy Code are similarly immune.

Likewise rebuffing a collateral attack upon a bankruptcy court's order, in *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940), this Court held:

"The argument is pressed that the District Court was sitting as a court of bankruptcy, with the limited jurisdiction conferred by statute, and that, as the statute was later declared to be invalid, the District Court was without jurisdiction to entertain the proceeding and hence its decree is open to collateral attack. We think the argument untenable. The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally." *Id.* at 376.

restriction under prior law that an order of a bankruptcy court must be 'necessary for the enforcement of the provisions of this title,' section 105 authorizes the bankruptcy court to also issue orders 'appropriate to carry out the provisions of this title.' This change evidences Congress' intent that bankruptcy courts would, under the Bankruptcy Code, deal with all phases and aspects of a bankruptcy case." 2 *Collier on Bankruptcy* ¶105.01[2], at 105-3 to 105-4 (Lawrence P. King ed., 1994) (emphasis in original; footnote omitted).

This Court has recognized three exceptions to the rule that one who is bound by an injunctive order may not collaterally attack the order but instead must seek to have the order revised or vacated either in the issuing court or on appeal. See *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967) (noting exceptions). Neither the Texas district court nor the Fifth Circuit found facts or circumstances permitting the invocation of any of these exceptions.

The first exception arises where the issuing court lacked subject matter jurisdiction. See *GTE Sylvania*, 445 U.S. at 386 (rebuffing collateral attack against "an injunctive order issued by a court with jurisdiction"); *Walker*, 388 U.S. at 315 (injunction may not be collaterally attacked when issued by a court with "jurisdiction . . . over the subject matter of the controversy").

The second exception arises where the court that issued the injunction lacked personal jurisdiction over the parties sought to be enjoined. See *Walker*, 388 U.S. at 315 (injunction may not be collaterally attacked when issued by a court with "jurisdiction over the petitioners"); see also *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 711 n.1 (1982) (Powell, J., concurring in the judgment) ("A district court must have personal jurisdiction over a party before it can enjoin its actions.").

The third exception arises where "the injunction was transparently invalid or had only a frivolous pretense to validity." *Walker*, 388 U.S. at 315.

Celotex now turns to demonstrate that the Edwardses cannot claim the benefit of any of these three exceptions to the rule prohibiting collateral attacks upon injunctive orders.

2. None of the three recognized exceptions to the prohibition on collateral attack is present

a. The first exception is inapplicable because the bankruptcy court had subject matter jurisdiction to issue injunctions pursuant to 11 U.S.C. §105(a) in Celotex's bankruptcy proceeding

In *United States v. Morton*, 467 U.S. 822, 828 (1984), this Court explained that "[s]ubject-matter jurisdiction defines the court's authority to hear a given type of case. . . ." Celotex filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code on October 12, 1990 in the Middle District of Florida. As authorized under 28 U.S.C. §§157 and 1334, the United States District Court for the Middle District of Florida has referred its exclusive jurisdiction over all bankruptcy cases, including Celotex's bankruptcy case, to the United States Bankruptcy Court for the Middle District of Florida.

As a result, the Florida bankruptcy court's subject matter jurisdiction over Celotex's bankruptcy proceeding cannot be disputed.

Nor can it be suggested that the issuance of injunctive relief is beyond the power of a bankruptcy court.⁷

⁷ The Edwardses have suggested that the question of the bankruptcy court's "power" to issue its §105(a) stay implicates the bankruptcy court's subject matter jurisdiction. See Brief in Opposition at 9. Celotex therefore discusses the bankruptcy court's power at this point.

However, this Court has recognized, in a case arising under patent law, that a challenge to a court's power to issue an injunction does not constitute a challenge to the issuing court's subject matter jurisdiction. See *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 23-26 (1913) (Holmes, J.). Rather, this Court held that the challenge to the issuing court's power constituted an

This Court has observed on numerous occasions that bankruptcy courts are courts of equity with power to enjoin actions that would undermine the due administration of a bankruptcy estate and the preservation of the rights of both secured and unsecured creditors. *See, e.g., Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734 (1931) (exercise of power to ascertain the validity of liens, marshal them, control their enforcement and liquidation); *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934) (exercise of power to enjoin attempt to enforce claim under wage assignment); *Pepper v. Litton*, 308 U.S. 295 (1939) (exercise of broad equitable power to subordinate or disallow claim reduced to judgment); *Young v. Higbee Co.*, 324 U.S. 204, 214 (1945) ("exercise [of] all equitable powers unless prohibited by the Bankruptcy Act" to order an accounting of improper benefits); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984) (exercise of power as "a court of equity" to determine how the equities of rejecting a collective bargaining agreement relate to the success of a reorganization).

This Court need not rely exclusively upon the general inherent equitable powers of bankruptcy courts to conclude that the Florida bankruptcy court had the power to issue injunctions; Congress specifically gave bankruptcy courts the power to issue injunctions of the type at issue when it enacted 11 U.S.C. §105(a).

Section 105(a) provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." In *United States v. Energy Resources Co.*, 495 U.S. 545 (1990), this Court explained:

attack upon the merits of the injunction. *See id.* at 26; *see also United States v. Holtzman*, 762 F.2d 720, 724 (CA9 1985) ("federal courts do not depend upon a specific delegation of power to issue injunctions in cases over which they otherwise have subject matter jurisdiction").

"The Code also states that bankruptcy courts may 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions' of the Code. §105(a). These statutory directives are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." *Id.* at 549.

The legislative history of §105(a) confirms that the Florida bankruptcy court was not acting beyond its power in issuing the injunction that is the subject of the *Edwardses'* collateral attack:

"The court has ample other powers to stay actions not covered by the automatic stay. Section 105, of proposed Title 11, derived from Bankruptcy Act §2a(15), grants the power to issue orders necessary or appropriate to carry out the provisions of title 11." S. Rep. No. 989, 95th Cong., 2d Sess. 51 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5837 (emphasis added).

See also H.R. Rep. No. 595, 95th Cong., 2d Sess. 342 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6298 (containing identical text).

The conclusion that the Florida bankruptcy court was well within its power when it issued an injunction pursuant to §105(a) gains further support from this Court's decisions construing §105(a)'s predecessor, §2a(15) of the Bankruptcy Act. For example, in *Steelman*, 301 U.S. at 289-91, this Court held that the bankruptcy court properly used §2a(15) to enjoin a corporation controlled by the debtor from initiating and maintaining a suit in another forum that threatened to undermine the bankruptcy court's ability to prevent the debtor from consummating a fraud upon his creditors.

Similarly, in *Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry. Co.*, 294 U.S. 648 (1935), this Court held:

"Moreover, by §2(15) of the Bankruptcy Act (U.S.C., Title 11, §11), courts of bankruptcy are invested with such authority in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, including the power to 'make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act.' . . .

"The bankruptcy court, in granting the injunction, was well within its power, either as a virtual court of equity, or under the broad provisions of §2(15) of the Bankruptcy Act or §262 of the Judicial Code." *Id.* at 676.

For these reasons, it is beyond question that the Florida bankruptcy court had subject matter jurisdiction over Celotex's reorganization. The bankruptcy court also had the power, expressly granted by Congress in 11 U.S.C. §105(a) and inherent in a court of equity, to issue injunctive orders. The Edwardses thus fail to come within the first of the three limited exceptions to the rule that injunctive orders may not be collaterally attacked.

b. The second exception is inapplicable because the bankruptcy court had personal jurisdiction over the Edwardses

Counsel for the Edwardses actively participated before the bankruptcy court in briefing the issues of whether the bankruptcy court could and should continue its stay of execution upon Celotex's supersedeas bonds.⁸

⁸ Having actually participated through counsel in the §105(a) litigation that occurred in the bankruptcy court, the Edwardses' collateral attack constitutes a particular affront to the established means by which a dissatisfied party may seek further review of an order. See *Stoll v. Gottlieb*, 305 U.S. 165

However, even if the Edwardses' counsel had not appeared and participated on behalf of the Edwardses' interests in the proceedings before the bankruptcy court, that court nevertheless had personal jurisdiction over them. Section 1334 of Title 28, United States Code, confers federal question jurisdiction over proceedings in bankruptcy. Bankruptcy Rules 7004(d) and 9014 invest bankruptcy courts with nationwide service of process.⁹

The relevant inquiry to determine whether the Florida bankruptcy court had personal jurisdiction over the Edwardses even if they had not appeared and participated in the bankruptcy proceedings is thus whether the Edwardses had sufficient minimum contacts with the United States. See *Diamond Mortgage Corp. v. Sugar*, 913 F.2d 1233, 1242-44 (CA7 1990), *cert. denied*, 498 U.S. 1089 (1991); see also *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1085 (CA1 1992) (in federal question cases in which a court enjoys nationwide service of process, "the Constitution requires only that the defendant have the requisite 'minimum contacts' with

(1938) (holding that orders of bankruptcy court are entitled to preclusive effect when subject to collateral attack). The Edwardses' participation through counsel in the bankruptcy court proceedings distinguishes this case from *Martin v. Wilks*, 490 U.S. 755, 761-69 (1989), where this Court held that those who were neither parties to nor participants in an action could not be bound by the terms of a consent decree reached in the action. The Edwardses' reliance upon *Martin* for the proposition that collateral attacks are routinely condoned, see Brief in Opposition at 7, is misplaced.

⁹ Bankruptcy Rule 7004(d) provides that "[t]he summons and complaint and all other process except a subpoena may be served anywhere in the United States." Bankruptcy Rule 9014 makes this nationwide service of process provision applicable in the context of contested matters (such as the various §105(a) proceedings).

the United States, rather than with the particular forum state").

As the Second Circuit explained in *Mariash v. Morrill*, 496 F.2d 1138 (1974), when examining another federal statute providing for nationwide service of process: "where, as here, the defendants reside within the territorial boundaries of the United States, the 'minimal contacts' required to justify the federal government's exercise of power over them are present." *Id.* at 1143 (footnote omitted). See also *Lisak v. Mercantile Bancorp. Inc.*, 834 F.2d 668, 671 (CA7 1987) (Easterbrook, J.) (holding in a RICO suit that an Illinois district court properly exercised personal jurisdiction over Florida resident who had no contacts with Illinois and noting that defendant "may not demand that the court applying the law of the United States be conveniently located"), *cert. denied*, 485 U.S. 1007 (1988).

It is undisputed that the Edwardses reside within the United States and had notice of the bankruptcy court's injunction. See *Celotex I*, 128 B.R. at 478 (list of counsel showing the participation of the Edwardses' counsel); *Jt. App.* 55-56 (certificate of service).

For these reasons, the Florida bankruptcy court possessed personal jurisdiction over the Edwardses. Accordingly, the second of the three limited exceptions to the rule prohibiting collateral attacks upon injunctive orders is unavailable to the Edwardses.

c. The third exception is inapplicable because the bankruptcy court's §105(a) stay was neither transparently invalid nor did it have only a frivolous pretense to validity

The §105(a) injunction at issue here is far removed from the type of frivolous injunction that this Court in *Walker* contemplated could be collaterally attacked. The

Fourth Circuit has already held that the §105(a) injunction is deserving of deference. See *Willis*, 978 F.2d at 149-50. In *Willis*, the Fourth Circuit held:

"We agree with the bankruptcy court that immediate execution against sureties on supersedeas bonds would have been detrimental to Celotex's ability to formulate a plan of reorganization. A hiatus from execution on the bonds was necessary to permit the bankruptcy court to take control of the immense litigation and to examine the underlying tort judgments to establish whether any portion of the awards was voidable. Consequently, the bankruptcy court did not act improperly in enjoining execution on supersedeas bonds posted to secure judgments against Celotex under §105(a)." *Id.* at 150.

If the Fourth Circuit's decision in *Willis* were not sufficient to prove the point, numerous other courts of appeals have held that a bankruptcy court may use 11 U.S.C. §105(a) to enjoin a creditor from proceeding against a third-party, just as the Florida bankruptcy court did when it enjoined Celotex's judgment creditors from proceeding against Celotex's sureties.

For example, in *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (CA2), *cert. denied*, 488 U.S. 868 (1988), the Second Circuit affirmed the bankruptcy court's issuance of a §105(a) injunction barring creditors from proceeding directly against the debtor's products liability insurers, explaining:

"Additional authority for the injunction is to be found in section 105(a) of the Bankruptcy Code, which permits the Bankruptcy Court to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.' This provision has been construed liberally to enjoin suits that might impede the reorganization process. In this case, the Bankruptcy Court found as a fact that to permit actions

against Manville's insurers arising from Manville's policies would adversely affect property of the estate and would interfere with reorganization." 837 F.2d at 93 (citations omitted).

In *Oberg v. Aetna Casualty & Sur. Co. (In re A.H. Robins Co.)*, 828 F.2d 1023, 1024-26 (CA4 1987), cert. denied, 485 U.S. 969 (1988), the Fourth Circuit affirmed a bankruptcy court's §105(a) injunction barring products liability plaintiffs from bringing direct actions against the debtor's insurers even though it was assumed that the plaintiffs, if successful on their claims, would not recover any property of the debtor's estate.

Similarly, in *In re Davis*, 730 F.2d 176 (CA5 1984) (per curiam), the Fifth Circuit itself recognized the breadth of §105(a):

"under 11 U.S.C. §105(a) a bankruptcy court is authorized, once jurisdiction is established, to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.' This provision includes the authority to enjoin litigants from pursuing actions pending in other courts that threaten the integrity of a bankrupt's estate." 730 F.2d at 183-84 (footnote omitted).

While the particular 11 U.S.C. §105(a) stay that the Florida bankruptcy court issued as to supersedeas bonds was predicated upon unique factual circumstances and may be the subject of disagreement,¹⁰ the foregoing decisions, and numerous others upholding the use of 11 U.S.C. §105(a) in circumstances similar to those facing the

¹⁰ Compare *Celotex I*, 128 B.R. at 484, with *Keene Corp. v. Acstar Ins. Co. (In re Keene Corp.)*, 162 B.R. 935, 944-49 (Bankr. S.D.N.Y. 1994).

Florida bankruptcy court,¹¹ demonstrate that the Edwardses cannot establish that the bankruptcy court's §105(a) injunction was either "transparently invalid" or had "only a frivolous pretense to validity." *Walker*, 388 U.S. at 315. Hence, the third exception allowing collateral attack is unavailable.

In sum, there is no record below that would permit the Edwardses to establish facts or circumstances that would allow application of any of the three narrow exceptions to the rule prohibiting collateral attacks upon injunctive orders. Accordingly, the Fifth Circuit erred in permitting the Edwardses to execute upon Celotex's supersedeas bond in violation of the bankruptcy court's §105(a) stay.¹²

¹¹ See, e.g., *LTV Corp. v. Miller (In re Chateaugay Corp.)*, 109 B.R. 613 (S.D.N.Y. 1990), appeal dismissed, 924 F.2d 480 (CA2 1991):

"The power of the Bankruptcy Court to enjoin the prosecution of suits which threaten the integrity of the reorganization process is not dependent on a showing that direct liability is sought to be imposed on the debtor. On the contrary, such an order is in the nature of an in rem injunction, in which the res, the reorganization, is protected in order to preserve the integrity of the bankruptcy court's necessarily exclusive jurisdiction." *Id.* at 622 (citations omitted).

¹² Celotex does not dispute that both the Texas district court and the Fifth Circuit could conduct a limited inquiry into whether the §105(a) injunction truly was an order of the court and whether Celotex had actually filed for bankruptcy. It should have quickly become evident to the district court and the Fifth Circuit that the Florida bankruptcy court had subject matter jurisdiction to issue the §105(a) injunction and that the Edwardses were not asserting any other ground that would permit a collateral attack. Thus, the Texas district court and the Fifth Circuit should have refrained from reaching both the merits of the Edwardses' motion seeking to execute upon the supersedeas bond and the merits of the bankruptcy court's §105(a) injunctive order.

3. Affirmance of the Fifth Circuit's ruling will produce chaos

This Court should not overlook the destructive consequences to our federal judicial system that will result if the Fifth Circuit's permissive view of collateral attack were to be upheld. The bankruptcy clause of the Constitution, giving Congress authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States," U.S. Const. Art. I, §8, cl. 4, would be rendered a nullity. If this Court were to affirm the Fifth Circuit's judgment, §105(a) injunctions would achieve nationwide effect only in those rare instances where every other federal and state court in the land agreed with the issuing court's weighing of the equities giving rise to the injunction.

Moreover, if the Fifth Circuit's permissive approach to a collateral attack were to be affirmed, judicial administration and the orderly process of judicial review will be undermined. All federal courts would be free to collaterally attack and second-guess the orders of all other such courts – simply because the deciding court disagrees with the merits of the other court's ruling. This will encourage forays to other forums, a multiplicity of proceedings, expense, delay and procedural maneuvering, thereby completely disrupting judicial administration and destroying confidence in the legal process. The ultimate result will be uncertainty and inconsistency in the law, increasing the number of directly conflicting rulings by coordinate federal courts and generating additional appeals to resolve the conflicts. It may even require this Court to intervene (through certiorari) more often, simply to settle such conflicts. In short, affirmance will produce conflict and chaos. This should not and cannot be countenanced.

For all of these reasons, the courts below erred – on both legal and policy grounds – when they permitted the

Edwardses to succeed in their collateral attack. Accordingly, the judgment of the Fifth Circuit should be reversed.

II. FEDERAL RULE OF CIVIL PROCEDURE 65.1 DOES NOT PERMIT THE TEXAS COURT TO ALLOW THE EDWARDSSES TO VIOLATE THE TERMS OF THE §105(a) INJUNCTION

A. Nothing In Rule 65.1, Providing A Streamlined Procedure For Judgment Creditors To Recover Against Sureties, Allows Recovery Against A Surety Where Prohibited By A Stay

In this case, the Edwardses elected to use Rule 65.1 as the means to collect their judgment. Rule 65.1 affords judgment creditors two procedural advantages: (1) judgment creditors need not initiate a separate lawsuit against the surety to recover on the bond; and (2) the clerk of the district court where the bond was provided will accept service of the motion seeking execution upon the bond on the surety's behalf. *See* Fed. R. Civ. P. 65.1. The rule thus "permits the liability of a surety to be enforced through an expeditious, summary procedure. . . ." *United States v. Lacey*, 982 F.2d 410, 413 n.2 (CA10 1992) (internal quotations and citation omitted).

Any attempt to collect the judgment would have been a violation of the §105(a) stay, as the Edwardses concede. *See* Brief in Opposition at 6 n.2. Thus, it is irrelevant whether the Edwardses used Rule 65.1, sued Northbrook on the bond in a separate action in Illinois, where Northbrook is located, or sued Northbrook on the bond in a separate action in the Texas district court.

Put simply, Rule 65.1 does not entitle the Edwardses to a different and better substantive outcome than if they had initiated a separate civil suit against Northbrook in Illinois or Texas to execute upon the bond. Rule 65.1

contains no grant of authority which permits a district court to override the injunction-issuing power that Congress vested in bankruptcy courts when it enacted 11 U.S.C. §105(a).

Although Rule 65.1 explains how a party may execute upon a supersedeas bond, the rule is silent concerning if and when a party may so execute. Thus, a district court presented with a Rule 65.1 motion must necessarily first inquire into whether execution is lawfully permitted at the time execution is sought. For example, if execution is being sought too soon – either before a judgment is affirmed on appeal or before the court of appeals returns its mandate to the district court – the Rule 65.1 motion must be denied. Of necessity, a district court's ruling on a Rule 65.1 motion must be governed by the determination of whether execution upon the supersedeas bond is otherwise permitted at the time execution is being sought. Thus, the §105(a) stay should have been dispositive of the Edwardses' Rule 65.1 motion in the Texas district court.

Nearly one year before the Texas district court decided the Rule 65.1 motion that the Edwardses filed in that court, the Florida bankruptcy court made clear that the Edwardses were stayed from executing upon Celotex's supersedeas bond. Two days after the Texas district court issued its order granting the Edwardses' Rule 65.1 motion, the Florida bankruptcy court reaffirmed the continued need for and propriety of its §105(a) injunction. At the time the Texas district court decided the Edwardses' Rule 65.1 motion, it was plain that existing law did not allow execution upon the supersedeas bond. The Texas district court therefore should have denied the Edwardses' Rule 65.1 motion.

B. Rule 65.1 May Not Impair Substantive Rights Protected Under The Bankruptcy Code

The Fifth Circuit's judgment is in conflict with this Court's decisions establishing that the Federal Rules of Civil Procedure must be applied so as not to impair substantive rights. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941) (Rules must be applied so as neither to "abridge, enlarge, nor modify substantive rights in the guise of regulating procedure") (internal quotations omitted); see also 28 U.S.C. §2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right.").

In enacting 11 U.S.C. §105(a), Congress conferred upon bankruptcy courts the substantive power to enjoin any proceeding determined to impair or hinder the debtor's reorganization efforts. The §105(a) stay was intended to protect the substantive rights of Celotex's many creditors and to protect Celotex's reorganization, the results that Chapter 11 was enacted to promote. See, e.g., *NLRB v. Bildisco & Bildisco*, 465 U.S. at 528 ("[t]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation").

If Rule 65.1 is read to authorize execution despite any applicable stay, the rule would directly conflict with an injunction expressly authorized under the Bankruptcy Code. In the event of such a conflict, it is the Federal Rules of Civil Procedure that must invariably give way.

For example, Federal Rule of Civil Procedure 3 provides that a civil action may be commenced "by filing a complaint with the court." Fed. R. Civ. P. 3. However, the Bankruptcy Code's automatic stay provision, 11 U.S.C. §362(a)(1), determines whether and when a civil action may be commenced against an entity that is in bankruptcy. See *Association of St. Croix Condominium Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 448 (CA3 1982) (automatic stay prohibits commencement of suit against debtor).

Similarly, Federal Rule of Civil Procedure 56(a) provides that a claimant may move for a summary judgment "at any time after the expiration of 20 days from the commencement of the action. . . ." However, where a civil action is pending in federal court against an entity at the time the entity files for bankruptcy, the automatic stay, 11 U.S.C. §362(a), prohibits the debtor's adversary from filing a summary judgment motion. See *Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371, 373 (CA10 1990).

The various discovery provisions contained in the Federal Rules of Civil Procedure also may not be used against a party that filed for bankruptcy while a federal court civil action was pending. See *Pope v. Manville Forest Prods. Corp.*, 778 F.2d 238, 239 (CA5 1985) ("absent the bankruptcy court's lift of the stay, . . . a case such as the one before us must, as a general rule, simply languish on the court's docket until final disposition of the bankruptcy proceeding").

It is beyond dispute that the §362 automatic stay – an injunction that takes effect without action of the bankruptcy court upon the filing of a petition for bankruptcy – suspends the operation of numerous Federal Rules of Civil Procedure whose operation would conflict with the automatic stay. It follows that where, as here, a bankruptcy court, pursuant to 11 U.S.C. §105(a), issues an injunction to augment the protection afforded the debtor by the automatic stay, that injunction, like the injunction provided by the automatic stay, suspends the operation of those Federal Rules of Civil Procedure which would otherwise permit actions that the injunction prohibits.

Indeed, in a different context, the Second Circuit soundly rejected the argument that a Federal Rule of Civil Procedure can restrict the power of a court to issue an injunction pursuant to 11 U.S.C. §105(a):

"There is no merit in [appellant's] argument that §105(a) does not apply to the present case

on the ground that Fed. R. Bankr. P. 7065 provides that 'Rule 65 F. R. Civ. P. applies in adversary proceedings. . . .' Rule 65 governs such matters as procedure, notice, time periods, and the proper form and service of injunctive orders. But, like the other Federal Rules of Civil Procedure, see, e.g., *Snyder v. Harris*, 394 U.S. 332, 337-38 (1969) (Rule 23); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941) (Rules 35 and 37), Rule 65 may not be construed as a limitation on the jurisdiction or power of the district court to issue a particular kind of injunction. Fed. R. Civ. P. 82." *Green v. Drexler (In re Feit & Drexler, Inc.)*, 760 F.2d 406, 415 (1985).

This is equally true of Rule 65.1.

Accordingly, if this Court were to conclude that enforcement of Rule 65.1 conflicts with enforcement of the bankruptcy court's §105(a) injunction, the Rules Enabling Act, 28 U.S.C. §2072(b), requires that Rule 65.1 give way to enforcement of the bankruptcy court's §105(a) injunction.

Of course, the Edwardses will still be free to seek modification of the §105(a) stay in the bankruptcy court, all the while protected by the supersedeas bond and the reserve account ordered by the bankruptcy court in *Celotex II*. Moreover, the §105(a) stay will be lifted and/or modified when the supersedeas bond adversary proceeding is decided. At that point, the Edwardses either will share in available assets according to the judgment in that proceeding or may use Rule 65.1 to collect the judgment against the surety.

In sum, this Court should hold that Rule 65.1 does not allow the Edwardses to execute upon Celotex's supersedeas bond so long as such execution is prohibited by the §105(a) stay of the Florida bankruptcy court.

III. WHILE THIS COURT SHOULD NOT REACH THE MERITS OF THE §105(a) STAY VIA A COLLATERAL ATTACK, THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION IN ISSUING THE STAY

As described above, this case involves an impermissible collateral attack on the Florida bankruptcy court's §105(a) stay. For this reason, this Court should not address the merits of the stay at this time, just as the Fifth Circuit should not have reviewed the merits.

This point is of particular importance to judicial administration, because the record regarding the §105(a) stay was not before the Texas district court below. The Texas district court held no hearings and received no evidence regarding the §105(a) stay;¹³ in contrast, the Florida bankruptcy court held hearings and received voluminous evidence. *Celotex II*, 140 B.R. at 914. Accordingly, the record required for informed appellate review of the §105(a) stay – and for this Court to use in setting standards for the future employment of §105(a) – is where one would expect it to be, in the Florida bankruptcy court.¹⁴

¹³ This simply illustrates that the Fifth Circuit's decision to review the merits of the stay by collateral attack is bad law and worse policy. The Fifth Circuit disapprovingly noted that materials relevant to a decision to issue the §105(a) stay were not before it. *Edwards II*, 6 F.3d at 320 n.7. However, *this very evidence* was in the record before the bankruptcy court. Compare *Edwards II*, *id.*, with *Celotex II*, 140 B.R. at 914 (discussion of bonds and agreements with sureties placed in evidence). One of the reasons for the rule against collateral attack, of course, is that the court in which the collateral attack occurs does not have the benefit of the full record made in the court which issued the order. That is precisely what happened in this case.

¹⁴ Should the Court wish, Celotex will make that record (which is voluminous) available to the Court.

The power of the bankruptcy court to issue the §105(a) stay has been demonstrated at length in Parts I.A.2.a. and c. of this Argument, and that discussion will not be repeated here. Celotex respectfully refers the Court to that discussion. Below, Celotex will briefly address the propriety of the stay on its merits in the event the Court determines that it is appropriate to review the merits.

Preliminarily, it is important to note that the abuse of discretion standard should be used to review the §105(a) stay. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975) (abuse of discretion standard should be used to review merits of preliminary injunction); *Brown v. Chote*, 411 U.S. 452, 457 (1973) (same); *American Imaging Servs., Inc. v. Eagle-Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.)*, 963 F.2d 855, 858 (CA6 1992) (abuse of discretion standard to be used in reviewing bankruptcy court's §105(a) stay of proceedings against debtor's officers); *Commonwealth Oil Ref. Co. v. United States Env'tl. Protection Agency (In re Commonwealth Oil Ref. Co.)*, 805 F.2d 1175, 1188 (CA5 1986) (abuse of discretion standard used to review denial of §105(a) stay), *cert. denied*, 483 U.S. 1005 (1987).¹⁵ In this case, it is beyond dispute that there was no abuse of discretion.

¹⁵ In *Edwards II*, the Fifth Circuit, in reviewing the advisability of the stay, never addressed the standard of review which it was to employ. To the extent that it was considering an appeal of a collateral attack, the Fifth Circuit should have reviewed the record for the existence of the three collateral attack exceptions which this Court set forth in *Walker*, *GTE Sylvania* and similar decisions. To the extent that it was reviewing the merits of the §105(a) stay, the Fifth Circuit should have employed the abuse of discretion standard it used in *Commonwealth Oil*.

A. The Bankruptcy Court's §105(a) Stay, Entered To Protect Celotex's Reorganization And All Of Its Creditors, Was Justified

The critical role of Celotex's insurance and the supersedeas bonds in Celotex's bankruptcy case has been explained in detail in the Statement of the Case. The bonded judgments alone represented \$70 million of assets otherwise available for creditors on the petition date. The bankruptcy court must determine whether some or all of those assets can be distributed to other creditors as a result of the bankruptcy.

The bankruptcy court's powers to avoid transfers and subordinate or disallow claims – under appropriate factual circumstances – are plain. Transfers of assets related to bonded judgments which fall within the preference period can and should be set aside as preferential. Transfers of assets related to bonded judgments which are constructively fraudulent conveyances (*e.g.*, a transfer on account of punitive damages is not for reasonably equivalent value, since the recipient gave *no* value), can and should be set aside as constructively fraudulent transfers under federal and state law. (The verdict, entry of judgment and posting of the bond in the *Edwardses'* civil tort action are all within Florida's four year fraudulent conveyance period, Fla. Stat. Ch. 726.110(1)-(2)). Moreover, punitive damage awards can and should be subordinated under 11 U.S.C. §510(c), 11 U.S.C. §726(a)(4) and/or the cases cited in footnote 12 of *Celotex I*. 128 B.R. at 484 n.12. Finally, executory contracts with the sureties can be rejected under 11 U.S.C. §365. As the bankruptcy court held, these debtor-creditor issues should be resolved by the bankruptcy court before the \$70 million is distributed.¹⁶ *Celotex I*, 128 B.R. at 484. If Celotex's

¹⁶ In making this determination, the bankruptcy court employed the proper standard for the grant of injunctive relief.

supersedeas bonds are executed upon, as a practical matter the bankruptcy court will lose its ability to grant effective relief with respect to these issues.

When Celotex and Carey Canada filed for relief in bankruptcy, there were approximately 140,000 asbestos claimants who were not the beneficiaries of supersedeas bonds. *Id.* at 482. As previously noted, these claimants will likely collect only a fraction of their compensatory damages – and no punitive damages. There were also approximately 100 supersedeas bonds, collateralized by nearly \$70 million worth of Celotex's assets, *id.*; *Celotex II*, 140 B.R. at 914 (explaining collateralization), posted to benefit 229 judgment claimants. Under these circumstances, as the Fourth Circuit's analysis in *Willis* illustrates, *see* 978 F.2d at 149-50, it is not an abuse of discretion for the bankruptcy court to stay execution on the bonds until it can resolve the issues currently before it for decision. Indeed, faced with these facts, it would be an abuse of discretion *not* to stay execution.

B. The Fifth Circuit's Decision Overlooks The Important Bankruptcy Policies That The §105(a) Stay Promoted

The *Edwards II* decision completely disregards the bankruptcy policy that similarly situated creditors must

See Celotex II, 140 B.R. at 914-16 (discussing and applying the Eleventh Circuit's four part standard for such relief). Celotex refers the Court to that discussion for the details regarding how the standard is met here. *See id.* Moreover, the Sixth Circuit in *Eagle-Picher* held that, in this context, the bankruptcy court need not even give any significant weight to the factor involving the debtor's ultimate likelihood of success on the merits. 963 F.2d at 859-60. Here, of course, the bankruptcy court found that Celotex made a clear evidentiary showing with regard to this factor, as well as the other three factors. *Celotex II*, 140 B.R. at 914-16. These factual findings are not clearly erroneous and thus cannot be set aside on appeal. Fed. R. Bankr. P. 8013.

be treated alike. See, e.g., *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1277 (CA5 1991) (discussing need to treat similarly situated creditors alike), *cert. denied*, 113 S. Ct. 72 (1992). Because the Fifth Circuit improperly allowed a collateral attack to succeed while the Fourth Circuit did not, Celotex's bonded judgment creditors with cases pending in the Fifth Circuit were permitted to recover upon their judgments immediately, while in the Fourth Circuit, bonded judgment creditors were required to seek relief from the Florida bankruptcy court.

Public policy mandates a centralization of authority to govern debtor-creditor relationships in a bankruptcy case. The bankruptcy court must act in the interest of the debtor's reorganization and protect the rights of *all* creditors wherever located. Thus, the bankruptcy court often will view the equities of a given situation differently from a court presiding over an isolated proceeding. The Fifth Circuit concluded, based upon a plainly inadequate record, that the equities favored a ruling that allowed two plaintiffs before it to execute upon a supersedeas bond to collect an award of punitive damages against Celotex. In so doing, the Fifth Circuit made a judgment which the Florida bankruptcy court was better positioned and qualified, as well as exclusively authorized, to make. This judgment must be made with all creditors – not just the Edwardses – in mind.

The *Edwards II* decision also overlooks the fact that the §105(a) stay merely maintains the status quo for a time and does not destroy any rights to the supersedeas bonds. The stay enables the bankruptcy court to determine whether the transfers to procure the bonds can be avoided or the claims subordinated or disallowed. It may also enable the bankruptcy court to confirm a plan of reorganization that may alter or otherwise modify payment obligations as to the affirmed judgments. See 11 U.S.C. §1123. Such bankruptcy court actions could permit

the use of Celotex's collateral to benefit all creditors. Finally, the *Edwards II* decision intruded upon the bankruptcy court's exclusive jurisdiction over Celotex's property, the cash that secures Celotex's supersedeas bonds, and the determination of what may constitute property by virtue of the avoiding powers available in a bankruptcy. See 28 U.S.C. §1334(d); see generally *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983).

The bankruptcy court is in the best position to address these complex disputed issues via a full and fair determination on the merits. See, e.g., *Celotex II*, 140 B.R. at 917 (ordering Celotex to initiate an adversary proceeding against the beneficiaries of, and sureties on, supersedeas bonds). The Fifth Circuit's decision attempts to "dispense justice" by divesting the bankruptcy court of its exclusive jurisdiction to make determinations which are *critical* to Celotex's reorganization effort. Indeed, the Fifth Circuit's decision, if affirmed, would ensure that *no court* will address these issues, on the merits, as to the Edwardses.

C. The Edwardses' Expectations Regarding The Supersedeas Bond, While Not Controlling, Have Not Yet Been Disappointed

Instead of acknowledging the many reasons favoring deference to the bankruptcy court's injunctive order, the court in *Edwards II* spoke in poignant terms about its duty to see that the Edwardses' expectations regarding Celotex's supersedeas bond were not dashed. See *Edwards II*, 6 F.3d at 320.

The Edwardses' expectations, while worthy of consideration, simply are not controlling. This Court has recognized that bankruptcy affects the settled expectations of creditors and third-parties alike. See *Whiting Pools*, 462 U.S. at 206 ("As does all bankruptcy law,

§542(a) modifies the procedural rights available to creditors to protect and satisfy their liens."); *NLRB v. Bildisco & Bildisco*, 465 U.S. at 532 ("But the filing of the petition in bankruptcy means that the collective-bargaining agreement is no longer immediately enforceable, and may never be enforceable again."). The postponement of enjoyment, or modification, of the Edwardses' pre-petition "rights" is far from unique in the Celotex bankruptcy or unusual in bankruptcies in general. See *Whiting Pools*, 462 U.S. at 206.

As matters stand today, the Edwardses are in no worse position than the day Celotex filed for bankruptcy. The Florida bankruptcy court's §105(a) stay does not discharge Celotex's supersedeas bond, nor does the stay reduce the amount of the bond. Indeed, in the exercise of its discretion to balance the claims of competing creditors, the bankruptcy court has directed Celotex to establish a reserve account as adequate protection for the bonded claimants, including the Edwardses. *Celotex II*, 140 B.R. at 917. This is an appropriate balancing of the equities.

The exact benefit that the Edwardses will ultimately obtain from Celotex's supersedeas bond has not yet been determined. However, the Edwardses' expectations regarding the bond have not yet been disappointed. The Edwardses have simply been put on hold pending resolution of the important bankruptcy issues implicated here. Meanwhile, their interests have been protected. This is eminently reasonable under difficult circumstances. It is not an abuse of discretion.

Accordingly, in the event that this Court were to conclude that the Fifth Circuit appropriately reached or could reach the merits of the bankruptcy court's §105(a) stay, this Court should hold that the bankruptcy court did not abuse its discretion in issuing its stay.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1994

THE CELOTEX CORPORATION,
Petitioner,
v.

BENNIE EDWARDS AND JOANN EDWARDS,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENTS

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STATUTES AND RULES INVOLVED

11 U.S.C. § 105(a) provides, in pertinent part:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

28 U.S.C. § 1334(b) provides:

Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Rule 62(d) of the Federal Rules of Civil Procedure provides:

Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Rule 65.1 of the Federal Rules of Civil Procedure provides, in pertinent part:

Whenever these rules . . . require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the

bond may be served. The surety's liability may be enforced on motion without the necessity of an independent action.

STATEMENT OF THE CASE

On August 17, 1987, Respondents Bennie and Joann Edwards ("the Edwards") filed a lawsuit against Petitioner Celotex Corporation ("Celotex") and fifteen other companies in federal court in their home town of Wichita Falls, Texas. R. 1.¹ The Edwards alleged that Bennie Edwards had developed disabling lung disease as a result of his work in the State of Texas with and around asbestos insulation products made by each of the defendants or their respective predecessors in interest.² R. 1-7. As a result of his disease, the Edwards alleged, Bennie Edwards had incurred medical expenses, sustained a loss of his earning capacity, and experienced progressive physical discomfort and mental distress, and his wife Joann had suffered the loss of her husband's consortium and support. R. 10-13. The Edwards asserted that under Texas law each defendant was jointly and severally liable

¹ Citations to the record appear as "R. ____." The portions of the record included in the Appendix to Celotex's Petition for Certiorari are cited as "P.A. ____." Citations to the Joint Appendix appear as "J.A. ____." Citations to the Appendix to the Brief *Amicus Curiae* of Northbrook Property and Casualty Insurance Company appear as "N.A. ____."

² As Celotex points out in its brief at 5, its liability was predicated on its status as corporate successor to the Philip Carey Manufacturing Company, a long-time manufacturer of asbestos insulation products. J.A. 19-21.

for the Edwards' damages and independently liable for punitive damages. R. 6-10, 12.

The Edwards' case came to trial in April of 1989. All of the remaining defendants except Celotex settled with the Edwards. After a five day trial, during which Celotex vigorously challenged the Edwards' allegations of causation, liability, and damages, the jury returned a verdict awarding the Edwards \$491,000.00 in compensatory damages. R. 1291-93. The jury also assessed Celotex \$245,500.00 in punitive damages. R. 1300. Applying Texas law, the district court reduced the award of compensatory damages by the percentage of responsibility for the Edwards' injuries allocated by the jury to the defendants that had settled prior to trial. On April 17, 1989, the court entered final judgment in favor of the Edwards and against Celotex in the amount of \$35,525.80 in compensatory damages and \$245,500.00 in punitive damages. P.A. 24-25. The judgment became enforceable ten days after the entry of judgment, on April 27, 1989. FED. R. CIV. P. 62(a).

To stay execution of the judgment pending appeal, Celotex filed a supersedeas bond in favor of the Edwards executed by Northbrook Property and Casualty Insurance Company ("Northbrook") in the amount of \$294,987.88, and moved the district court to approve the bond. The bond contained the customary language "bind[ing]" Northbrook to pay the Edwards the amount specified by the bond unless Celotex "shall prosecute said appeal and answer to Bennie Edwards and Joann Edwards for all damages, interest, and cost." J.A. 12-13. Celotex's motion to approve the bond did not disclose that Celotex had obligated itself to reimburse Northbrook in the event that Northbrook was required to pay on the bond, nor did the motion reveal that Celotex had secured its reimbursement obligation to Northbrook with

property in which Celotex had an interest. The Edwards did not oppose the motion to approve the bond, and the district court approved the bond on June 5, 1989. J.A. 11. Upon approval of the bond, the stay of the judgment became effective. FED. R. CIV. P. 62(d).

On appeal, Celotex challenged the punitive damage element of the judgment as unconstitutional, excessive, and insupportable under applicable substantive law. A Fifth Circuit panel unanimously rejected Celotex's contentions, and affirmed the judgment in its entirety in an opinion and judgment issued September 20, 1990. *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151 (5th Cir. 1990), J.A. 18. Celotex did not file a motion for rehearing. Under Rule 41 of the Federal Rules of Appellate Procedure, the mandate was due to be issued on October 11, 1990. The clerk of the Fifth Circuit actually issued the formal mandate on October 12, 1990.

On the afternoon of October 12, 1990, Celotex filed a petition for reorganization under Chapter XI of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida. Under 11 U.S.C. § 362(a), the filing of the petition automatically stayed all judicial proceedings against Celotex. Because the mandate of the Fifth Circuit had issued, however, the Edwards' case was complete at the time of the bankruptcy, and the judgment was then enforceable against Celotex and its surety Northbrook.³

³ Aetna Casualty and Surety Company has filed an *amicus curiae* brief asserting that a critical "assumption" in the question accepted by the Court for review – that the Edwards' judgment against Celotex was final and enforceable at the time of Celotex's bankruptcy filing – is unsupported by the record. Aetna bases its assertion on two assumptions of its own: the legal

Five days after the bankruptcy filing, on the application of Celotex and without prior notice to the Edwards, the bankruptcy court entered an emergency ex parte order purporting to enjoin "all entities" from "commencing or continuing any judicial, administrative, or other

assumption that the Fifth Circuit's mandate was not effective to conclude the appeal and make the judgment final and enforceable until it was physically received by the district court, and the factual assumption that because the Fifth Circuit issued the mandate on the date of the bankruptcy, the district court "presumptively" did not receive the mandate until after the bankruptcy filing. Aetna Br. at 6-7. Because the case was still technically on appeal at the time of the bankruptcy, Aetna argues, the judgment never became final due to the application of the automatic bankruptcy stay, 11 U.S.C. § 362(a)(1). Aetna Br. at 8. Accordingly, Aetna contends, the Court lacks jurisdiction over this case. Aetna Br. at 9-10.

Aetna's attempt to persuade the Court to avoid the merits should fail for three reasons. First, Aetna's legal premise is incorrect: "the appellate process is terminated . . . when an appellate court issues its mandate of affirmance." *United States v. Cook*, 705 F.2d 350, 351 (9th Cir. 1983) (emphasis added); accord *United States v. DiLapi*, 651 F.2d 140, 144 n.3 (9th Cir. 1981) (relying on issuance of mandate from court of appeals as event that returned jurisdiction to the district court, even though record did not disclose when mandate from the court of appeals was received in the district court); *Newball v. Offshore Logistics Int'l*, 803 F.2d 821, 826 (5th Cir. 1986) ("[w]hen an appellate mandate is issued, a district court reacquires jurisdiction"). Second, Aetna's factual premise is wrong; the record reveals that for whatever reason, the district court actually received the judgment and mandate of the court on October 10, 1990, two days before it was formally issued. R. 1417, 1418; Docket Sheet at 16. Finally, even if the automatic stay applied to the appeal, it would not affect the finality of the order on the Edwards' subsequent motion to enforce the bond against Northbrook. Thus, this Court has jurisdiction over this proceeding, and should decide the question presented for review.

proceeding involving any of the Debtors regardless of (a) who initiated the proceeding, (b) whether the matter is on appeal and a supersedeas bond has been posted by the debtors or (c) the appellant in an appeal is one of the debtors." P.A. at 28. The order was not specifically directed to the Edwards, or to any other party in particular. Moreover, the order on its face purported to restrain only efforts to enforce judgments or debts "against the debtor or against property of the debtor," P.A. 27, and expressly refrained from enjoining actions to collect on debts owed by third parties, P.A. at 28-29, ¶ 5. As authority for the issuance of the order, the bankruptcy court cited §§ 105 and 362 of the Bankruptcy Code. P.A. 26.⁴

After the bankruptcy court issued its ex parte stay order, many plaintiffs with bonded judgments against Celotex on appeal, including some represented by counsel for the Edwards, sought clarification, modification, or

⁴ The order did not comply with the requirements for the issuance of a temporary restraining order or preliminary injunction of FED. R. BANKR. P. 7065 and FED. R. CIV. P. 65, in that

- it was issued without notice to any of the "entities" that it purported to affect, and did not state the reasons why the order was granted without notice (FED. R. CIV. P. 65(b));
- it did not expire by its terms within ten days of the date of its entry (FED. R. CIV. P. 65(b));
- it did not recite in any meaningful way "the reasons for its issuance" (FED. R. CIV. P. 65(d)); and
- it purported to bind "entities" who were not formal parties to the action (FED. R. CIV. P. 65(d)).

Indeed, though it contained injunctive language, the order was couched not as an injunction but as an order "extending" the automatic stay.

dissolution of the order.⁵ Meanwhile, claimants whose bonded judgments against Celotex had, as of the date of the bankruptcy, survived appeal and were enforceable began to attempt to execute against the sureties on the supersedeas bonds securing the judgments in the courts in which the bonds had been posted. On January 2, 1991, a federal court in Norfolk, Virginia granted a motion under Rule 65.1 of the Federal Rules of Civil Procedure by four plaintiffs to release a supersedeas bond securing a judgment against Celotex, notwithstanding the bankruptcy court's stay order.⁶ R. 1453-61. On May 3, 1991, the Edwards filed a similar motion, asking the district court in Texas to enforce the terms of the supersedeas bond executed by Northbrook despite the bankruptcy court's order. R. 1423. In their supporting memorandum, the

⁵ Although it is true that the Edwards' counsel, on behalf of other clients with bonded judgments that were still pending on appeal, filed pleadings in the bankruptcy court challenging the stay order, the implication by Celotex and the flat assertion by Northbrook that counsel had appeared on behalf of the Edwards in the bankruptcy court prior to filing their Rule 65.1 motion (*see* Celotex Br. at 8-11 and Northbrook Br. at 6 n.2 and 18) is misleading and unsupported. The Edwards have filed no claim against Celotex in the bankruptcy, and have consistently maintained that the bankruptcy court lacks subject matter jurisdiction to enjoin enforcement of, and to affect their interest in, the supersedeas bond approved by the federal court in Texas. *See* Joint Status Report filed February 3, 1992 (J.A. 59-60). The Edwards did answer an adversary proceeding to invalidate the bonds, filed by Celotex almost two years after the bankruptcy court's initial stay order, subject to an objection to the bankruptcy court's subject matter jurisdiction. N.A. 152-53.

⁶ The order was later reversed by the Fourth Circuit. *Willis v. Celotex Corp.*, 978 F.2d 146 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1846 (1993).

Edwards candidly advised the district court of the bankruptcy court's October 17, 1990 stay order, R. 1447, 1450-52, but contended that the bankruptcy court was "simply without jurisdiction" to stay enforcement of an obligation in which Celotex had no property interest. R. 1447. Both Celotex and Northbrook opposed the motion, arguing both that the proceeding against Northbrook was stayed under 11 U.S.C. § 362 and that the Edwards had been effectively enjoined from attempting to enforce the bond by the bankruptcy court's October 17, 1990 order. R. 1524-47 (Celotex opposition); J.A. 28-33 (Northbrook opposition).

On June 13, 1991, nearly six weeks *after* the Edwards filed their motion in Texas, the bankruptcy court issued an "omnibus order" clarifying the intended scope of its October 17, 1990 stay order. *In re Celotex*, 128 B.R. 478 (Bankr. M.D. Fla. 1991), P.A. 30. In its omnibus order, the bankruptcy court asserted for the first time that its October 17, 1990 order extending the § 362 automatic stay was additionally intended to enjoin persons who, like the Edwards, had final, enforceable judgments against Celotex at the time of the bankruptcy from pursuing remedies against the third parties that had issued supersedeas bonds securing the judgments. 128 B.R. at 484-85, P.A. 46. The bankruptcy court acknowledged that Celotex had no property interest in such bonds; upon the successful completion of the appeals by the judgment creditors, the court noted, Celotex's "reversionary" interest in the supersedeas bond had been "divested." 128 B.R. at 481, 482, P.A. 36, 39-40. Accordingly, the court observed, the § 362 stay of proceedings "against the debtor or against the debtor's estate" did not preclude enforcement of supersedeas bonds securing judgments that were final at

the time of the bankruptcy. *Id.* The bankruptcy court nevertheless purported to find authority to enjoin enforcement of supersedeas bonds in which Celotex has no property interest in § 105 of the Bankruptcy Code. The court theorized that enforcement of supersedeas bonds against third parties might in some way impede Celotex's ability to formulate a plan of reorganization, and suggested that in "mega" bankruptcy cases involving "multi-million dollars in claims and assets," the powers of the bankruptcy court under § 105 "*must in the initial stage be absolute, unless limited by the Bankruptcy Code or other federal laws.*" 128 B.R. at 484, P.A. 44 (emphasis added). Finally, the bankruptcy court hypothesized that some or all of the bonds could be set aside as preferential or fraudulent transfers, and that claims on judgments awarding punitive damages could be subordinated or disallowed. 128 B.R. at 484, P.A. 45. The court made this observation even though, eight months after filing the bankruptcy and obtaining the stay order, Celotex had not even *commenced* any proceeding to invalidate or avoid the supersedeas bonds.

In light of the bankruptcy court's recognition that Celotex did not have a property interest in the supersedeas bond that secured the Edwards' judgment, and with the belief that the bankruptcy court therefore lacked jurisdiction to enjoin proceedings against third parties involving the bond, the Edwards pressed their motion against Northbrook under Rule 65.1 in the district court in Texas. Celotex filed a supplemental response to the Edwards' Rule 65.1 motion in the Texas court, alerting the court to the bankruptcy court's omnibus order. J.A. 53-56. In a joint status report requested by the Texas court, Celotex and Northbrook reiterated their objections to the

proceeding based on the bankruptcy court's stay orders and the automatic bankruptcy stay. J.A. 57-63. Fully apprised of the bankruptcy court's stay orders and of the jurisdictional objections of Celotex and Northbrook, the district court nonetheless granted the Edwards' motion to enforce Northbrook's obligation under the supersedeas bond on May 27, 1991. P.A. 23. Celotex timely appealed. J.A. 64-65.

The Fifth Circuit affirmed, holding the § 362(a) automatic stay inapplicable and the bankruptcy court's extraordinary § 105 stay order ineffective to prevent the Edwards from recovering against Northbrook. *Edwards v. Armstrong World Indus., Inc.*, 6 F.3d 312 (5th Cir. 1993), P.A. 1. The Fifth Circuit first rejected Celotex's contention that the Edwards' motion against Northbrook was a proceeding "against the debtor or against property of the estate" stayed under § 362(a). Citing the bankruptcy court's own omnibus order, the Fifth Circuit held that because "the appellate process had been completed and Celotex no longer had an interest, reversionary or otherwise, in this particular supersedeas bond, the automatic stay provisions will not prevent Northbrook from fulfilling its obligation."⁷ 6 F.3d at 317, P.A. 13.

The Fifth Circuit then addressed the "more difficult issue" of whether the district court should have denied the Edwards' motion in deference to the bankruptcy court's § 105 stay order. 6 F.3d at 317, P.A. 13. The court observed that 28 U.S.C. § 1334(b) extends the subject matter jurisdiction of the bankruptcy courts to matters

⁷ On this issue, the Fifth Circuit's decision is consistent with that of the Fourth Circuit in *Willis v. Celotex Corp.*, 978 F.2d 146, 148-49 (4th Cir. 1992), cert. denied, 113 S. Ct. 1846 (1993).

"related to a case under title 11," and noted Celotex's threshold contention that "under this jurisdictional grant, the equitable powers of the bankruptcy court are sufficient to stay a proceeding to release the supersedeas bond." 6 F.3d at 318, P.A. 14. It then "sharpened" the issue to consider "whether prudential (or other) considerations justify extending the bankruptcy court's jurisdiction to the point where it includes the power to stay the proceedings in question here."⁸ *Id.*

The Fifth Circuit explained that a bankruptcy court's jurisdiction does not extend to proceedings involving property in which, as in this case, the debtor has no

⁸ Northbrook's suggestion that the Fifth Circuit did not question the bankruptcy court's subject matter jurisdiction to issue a stay order binding the Edwards and Northbrook, Northbrook Br. at 12, is therefore incorrect. The Fifth Circuit's decision was premised on the fact that the bankruptcy court lacked jurisdiction to enjoin the Edwards from proceeding against Northbrook. Although both Northbrook and Celotex attempt to make much of the Fifth Circuit's reference to the bankruptcy court's lack of "authority" and "power" to enjoin the Edwards' proceeding, rather than of the bankruptcy court's lack of "jurisdiction," the choice of terminology is inconsequential, and in fact was invited by Celotex. In its petition for rehearing addressed to the Fifth Circuit panel, Celotex itself confessed that in its "zeal to have the Northern District's order reversed, Celotex did not emphasize its argument regarding jurisdiction and venue and instead argued, in essence, that the court should affirm the Tampa bankruptcy court's temporary stay order." Celotex Petition for Rehearing filed November 19, 1993, at 2 n.3. The Fifth Circuit cannot be faulted for discussing at length the merits of the bankruptcy court's § 105 order when Celotex itself invited the court to do so.

interest. The court acknowledged that § 105 of the Bankruptcy Code authorizes bankruptcy courts to enjoin proceedings against non-bankrupt entities that threaten the integrity of the bankrupt's estate. 6 F.3d at 320, P.A. 18-19. It pointed out, though, that "the integrity of the estate is not implicated in the present case because [Celotex] has no present or future interest in this supersedeas bond." *Id.* The allegation that the bond was collateralized with Celotex's property, the court reasoned, did not affect this conclusion; whether Celotex could assume the surety agreement or avoid it and thus seek return of the collateral was an issue solely between Celotex and Northbrook. 6 F.3d at 320 n.7, P.A. 19. Responding to Celotex's argument that the policies informing the Bankruptcy Code favored centralized, uniform treatment of all Celotex judgment holders, the Fifth Circuit observed:

Although the idea of using the bankruptcy court as a clearing house for all of these cases may seem desirable as a policy matter, section 105(a) simply does not give bankruptcy courts authority over assets that are not property of the debtor's estate and in which the debtor has no interest. We cannot globalize the bankruptcy court's authority in that manner.

6 F.3d at 319, P.A. 16-17.

The Fifth Circuit also emphasized that § 105(a) should not be construed to grant to the bankruptcy courts power to "eviscerate the very purpose" of supersedeas bonds. 6 F.3d at 319, P.A. 17. The stay of execution of the April 17, 1989 judgment was granted to Celotex, the court noted, only because it furnished the Edwards with a court-approved promise by a third party to pay the judgment after appeal if Celotex were unable, for any reason,

to do so. *Id.* It would be "manifestly unfair," the court reasoned, "to force the judgment creditor to delay the right to collect with a promise to protect the judgment only to later refuse to allow that successful plaintiff to execute the bond because the debtor has sought protection under the laws of bankruptcy." 6 F.3d at 319, P.A. 17-18.

The court acknowledged that in *Willis v. Celotex Corp.*, 978 F.2d 146 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1846 (1993), the Fourth Circuit had found that the Celotex bankruptcy court was authorized under § 105 to issue its global stay on execution of supersedeas bonds. It expressly disagreed with the Fourth Circuit's reasoning and conclusion, holding that "[w]hatever the ultimate scope of § 105, it does not extend so far as to give the bankruptcy court authority over a supersedeas bond in which the debtor has no interest." 6 F.3d at 320, P.A. 19. Rejecting Celotex's contention that § 105 "gives bankruptcy courts virtually limitless ability to bring parties to heel to its authority," 6 F.3d at 318, P.A. 13, and citing a previous refusal to "bow in complete obeisance to a bankruptcy court stay,"⁹ 6 F.3d at 320, P.A. 20, the Fifth Circuit concluded that the district court had acted properly in allowing the Edwards to execute on the supersedeas bond against Northbrook.

To be sure, the bankruptcy court does not share the Fifth Circuit's concern that supersedeas bonds posted to

⁹ The court cited *Kellogg v. Blue Quail Energy, Inc. (In re Compton Corp.)*, 831 F.2d 586 (5th Cir. 1987), *modified on other grounds*, 835 F.2d 584 (5th Cir. 1988), in which it had held that a bankruptcy court could not enjoin a payment of funds from the obligor on a letter of credit to the beneficiary.

stay execution pending appeal serve their intended purpose. Unlike the Edwards, several persons with final bonded judgments against Celotex elected to acquiesce to the jurisdiction of the bankruptcy court and to seek relief from the stay orders directly from that court. On May 29, 1992, more than nineteen months after Celotex filed for bankruptcy protection and two days after the district court granted the Edwards' motion to allow execution on the supersedeas bond, the bankruptcy court issued an order denying the motions for relief from the § 105 stay. *In re Celotex*, 140 B.R. 912 (Bankr. M.D. Fla. 1992), P.A. 47. The bankruptcy court noted that the assets pledged by Celotex to secure the supersedeas bonds comprise a significant portion of Celotex's bankruptcy estate,¹⁰ and speculated that if the bonds were voided under some provision of bankruptcy law, the virtually innumerable unsecured creditors of Celotex would benefit.¹¹ 140 B.R.

¹⁰ Celotex alleges that on the date of its bankruptcy, it was jointly liable on about 100 supersedeas bonds, which secured about \$70 million in judgments. P.A. 41, 49. Although this number is large, it must be kept in perspective. Prior to the bankruptcy, Celotex had paid out some \$360 million in settlement of asbestos-related personal injury claims. P.A. 49 n.2. Celotex has not suggested that any of these payments were preferential or fraudulent, and has not attempted to recoup them for the benefit of the estate. The record is silent on the potential size of Celotex's bankruptcy estate.

¹¹ The extent of the benefit is, of course, dependent on the number of unsecured creditors. The bankruptcy court's opinion states that over 141,000 suits against Celotex for asbestos-related personal injury or property damage were pending at the time of Celotex's bankruptcy filing. In the years following the bankruptcy filing, an enormous but unknown number of claims have accrued. Even if all supersedeas bonds were voided and the assets securing the bonds made available to unsecured

at 914-16, P.A. 53-57. The bankruptcy court acknowledged that the enforcement of supersedeas bonds is "a matter of risk distribution" and that allowing judgment holders to enforce their bonds against third party sureties "would merely shift the battleground," requiring the sureties to bear the burden of Celotex's bankruptcy in the place of the judgment holders (as, of course, the bonds were intended to do). 140 B.R. at 915, P.A. 53, 52. Inexplicably, however, the bankruptcy court then suggested that payment to the judgment holders on the supersedeas bonds "may foster an apocalypse" and hinder the development of a successful plan of reorganization. 140 B.R. at 915, P.A. 54. Without explanation, the bankruptcy court also suggested that "dissolution of the § 105 stay could transform this case into another *Jarndyce v. Jarndyce*." 140 B.R. at 916, P.A. at 54-55 (citing CHARLES DICKENS, *BLEAK HOUSE* (1853)).

More than two years have passed since the bankruptcy court issued its order denying relief from the § 105 stay. To date, the bankruptcy court has not given leave for any judgment creditor to collect on a supersedeas bond, making the court's reference to *BLEAK HOUSE* in its May, 1992 order a sad irony.¹² The adversary proceeding to void all supersedeas bonds issued by Celotex, brought by

creditors, the benefit to each creditor would be negligible. The professed concern of Celotex and the bankruptcy court for the unsecured creditors of Celotex is unconvincing and pretextual.

¹² One frustrated judgment creditor has filed a complaint with the United States Court of Appeals for the Eleventh Circuit, alleging that the bankruptcy judge is guilty of judicial misconduct in failing to schedule proceedings which would determine the creditor's right to immediate enforcement of the bond against the surety. 9 MEALEY'S LITIGATION REPORTS, ASBESTOS, No. 12, at 7, E-1 (July 15, 1994).

Celotex almost two years after its bankruptcy filing and to which the Edwards are a party, is unresolved with no trial date scheduled or imminent. Before this Court issues its judgment in this case, the Celotex bankruptcy will have been pending for more than four years, with no end in sight. And the promise by Northbrook to pay the Edwards' judgment when final if Celotex could not do so, made pursuant to Federal Rule 62(d) in 1989, remains unfulfilled.

SUMMARY OF ARGUMENT

The Fifth Circuit properly held that the Celotex bankruptcy court's attempt to stay execution of supersedeas bonds under § 105 of the Bankruptcy Code did not preclude the district court from granting the relief sought by the Edwards against Northbrook under Rule 65.1. As Celotex itself concedes, a judgment or order issued by a court that does not have jurisdiction is void and is not binding on other courts. Unless the bankruptcy court had jurisdiction under 28 U.S.C. § 1334(b) to affect the rights of the Edwards, who are not parties to the Celotex bankruptcy, against Northbrook, the Fifth Circuit was under no obligation to honor the stay order as it applied to the Edwards.

In *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32, 112 S. Ct. 459 (1991), this Court recognized that the broad jurisdiction granted by Congress to the bankruptcy courts under § 1334(b) is limited by other, more specific provisions of federal law. Similarly, in *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1765 (1994), this Court noted that absent a clear showing

that Congress intended to disturb state law and traditions, "the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law."

Celotex and Northbrook do not and cannot show that in enacting § 1334(b), Congress intended to vitiate the benefits granted to judgment creditors and judgment debtors by Rules 62(d) and 65.1 of the Federal Rules of Civil Procedure and corresponding state law governing the suspension and securing of money judgments. For more than two hundred years, federal law has permitted a party liable on a judgment to obtain a stay of execution pending appeal, but only if the judgment debtor posts a supersedeas bond or other security that would assure the judgment creditor full satisfaction upon completion of the appeal. The decisions of this Court recognize that the obligations of a surety on a supersedeas bond are more than merely contractual; they are grounded in law and tradition. Yet if bankruptcy courts were permitted to exercise jurisdiction over proceedings involving supersedeas bonds, the protections that bonds provide to judgment creditors would be eviscerated. Such an expansive interpretation of § 1334(b) would harm defendants as well as plaintiffs in civil cases, and would wreak havoc in the state and federal judicial systems. Courts would be more reluctant, or perhaps entirely unwilling, to approve supersedeas bonds, making it more difficult for defendants to obtain stays of execution; the courts would be compelled to supervise detailed post-judgment discovery concerning the nature of the relationship between the judgment debtor and the surety; and litigants would lose faith in the ability of the courts to protect and enforce their judgments. Congress could not have intended such

consequences in enacting § 1334(b). Absent a clear showing of such intent, the statute should not be interpreted to disturb ancient federal and state practices governing the suspension and bonding of judgments.

Celotex's commencement of an adversary proceeding within the bankruptcy case to invalidate all of the supersedeas bonds that it posted before its bankruptcy, including the Edwards' bond, did not give the bankruptcy court after-the-fact jurisdiction to enjoin the Edwards' motion against Northbrook. The bankruptcy court issued its stay order almost two years *before* Celotex commenced its adversary proceeding, and the order does not even purport to comply with the requirements for an injunction connected with an adversary proceeding specified by FED. R. BANKR. P. 65 and FED. R. CIV. P. 65. Moreover, the theories upon which Celotex seeks to set aside the Edwards' bond are frivolous. Celotex's contention that the bankruptcy court could affect Northbrook's liability to the Edwards on the bond under the theories of disallowance or equitable subordination is undermined by the plain language of 11 U.S.C. § 524(e), which provides that discharge of a claim against a debtor will not affect the liability of any other entity on that claim. Celotex's alternative allegation that its posting of the bond was "constructively fraudulent" because Celotex received "no value" for the bond defies common sense and flies in the face of precedent of this and other Courts recognizing the benefits that a judgment debtor enjoys by posting a supersedeas bond. Celotex's adversary proceeding thus does not support the exercise of jurisdiction by the bankruptcy court to impair the execution of the supersedeas bond against Northbrook in this case.

Finally, notions of comity did not require the Fifth Circuit to deny the Edwards relief in deference to the bankruptcy court's stay order. Although Celotex and Northbrook correctly state the general rule that courts should ordinarily give effect to injunctive orders issued by other courts, the general rule does not apply if the court that issued the order lacked jurisdiction to do so. Northbrook's characterization of the Fifth Circuit's refusal to honor the bankruptcy stay as "unseemly" is misplaced. It is the bankruptcy court's attempt to interfere with the ability of other federal courts to enforce their judgments, when such enforcement would not affect the bankruptcy estate, that violates notions of comity. The Fifth Circuit's refusal to defer to the bankruptcy court's attempt to exercise "absolute" power over parties not before it was appropriate under the circumstances of this case. The Fifth Circuit's judgment should be affirmed.

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY UPHELD THE DISTRICT COURT'S ORDER ALLOWING EXECUTION ON THE SUPERSEDEAS BOND AGAINST NORTHBROOK NOTWITHSTANDING THE BANKRUPTCY COURT'S ORDER PURPORTING TO STAY EXECUTION ON SUPERSEDEAS BONDS GENERALLY, BECAUSE THE BANKRUPTCY COURT DID NOT HAVE JURISDICTION TO ISSUE THE ORDER.

A. If the Bankruptcy Court Lacked Jurisdiction To Issue the Stay Order, Then the Fifth Circuit Correctly Declined To Honor It.

Both Celotex and Northbrook concede that the Fifth Circuit properly allowed the Edwards to execute against

Northbrook on the supersedeas bond notwithstanding the bankruptcy court's stay order if the bankruptcy court was without jurisdiction to issue the order.¹³ Celotex Br. at 26; Northbrook Br. at 15-17. This concession is well-advised, as it is supported by precedent of this Court and others. See *Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940) (because filing of bankruptcy petition by farmer ousted state court of subject matter jurisdiction over foreclosure proceeding, subsequent action of state court "was not merely erroneous but was beyond its power, void, and subject to collateral attack"); *Vallely v. Northern F. & M. Ins. Co.*, 254 U.S. 348, 353-54 (1920) (if courts act beyond authority delegated to them, "their judgments and orders are nullities. They are not voidable, but simply void, and this even prior to reversal"); *In re Sawyer*, 124 U.S. 200

¹³ Despite its concession, Celotex suggestively cites this Court's opinions in *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940) and *Stoll v. Gottlieb*, 305 U.S. 165 (1938), hinting that even if the bankruptcy court lacked jurisdiction to stay execution of the supersedeas bond against Northbrook, then the stay must be given preclusive effect. Celotex Br. at 24, 30 n. 8. The cases are, however, distinguishable. Each involved a collateral attack on a bankruptcy order by a party that had previously appeared and asserted a claim in the bankruptcy and had had an opportunity to challenge the bankruptcy court's jurisdiction in the bankruptcy proceeding itself. *Chicot County Drainage Dist.*, 308 U.S. at 375 (noting that creditors "were parties" and "had full opportunity to present any objections to the proceeding"); *Stoll*, 305 U.S. at 177 ("we base our conclusion here on the fact that in an actual controversy the question of the jurisdiction over the subject matter was raised and determined adversely to the respondent"). In contrast, the Edwards have not filed a claim against Celotex in the bankruptcy case. As Celotex ultimately appears to recognize, the Edwards therefore had no opportunity, and no obligation, to challenge the bankruptcy court's jurisdiction in that proceeding.

(1888) (holding contempt citation for violating injunction "null and void" because court issuing injunction had no jurisdiction to do so); *Querner v. Querner (In re Querner)*, 7 F.3d 1199, 1201 (5th Cir. 1993) ("Where a federal court lacks jurisdiction, its decisions, opinions, and orders are void").

Celotex and Northbrook are thus forced to attack the Fifth Circuit's conclusion that the bankruptcy court did not have jurisdiction to stay "all entities" from enforcing supersedeas bonds against third parties to the bankruptcy. But, as demonstrated below, the legislative history of the statutory grant of jurisdiction to the bankruptcy courts, the precedent interpreting the grant, and the policies underlying both supersedeas bonds and bankruptcy all support the Fifth Circuit's conclusion.

B. The Bankruptcy Court Lacked Jurisdiction To Restrain the Edwards from Executing Against Northbrook on the Supersedeas Bond.

It is axiomatic that "[b]ankruptcy courts are courts of limited jurisdiction, whose scope is statutorily defined." *Querner*, 7 F.3d at 1201. The "limited authority Congress has vested in bankruptcy courts," *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32, ___ 112 S. Ct. 459, 464 (1991), is confined to jurisdiction over the debtor's property and property of the bankruptcy estate, 28 U.S.C. § 1334(d), and civil proceedings "arising in or related to title 11," 28 U.S.C. § 1334(b).

Celotex and Northbrook do not seriously contend that the bankruptcy court had exclusive jurisdiction over the Edwards' action to execute against Northbrook on the supersedeas bond. As the Fifth Circuit pointed out and

even the bankruptcy court acknowledged, Celotex's contingent interest in the supersedeas bond¹⁴ had been extinguished prior to the bankruptcy by the affirmance of the Edwards' judgment against Celotex. The bankruptcy court had subject matter jurisdiction to issue orders affecting the bond, then, only if the proceedings on the bond were "related" to the Celotex bankruptcy itself within the meaning of § 1334(b).

1. The Jurisdictional Grant in § 1334(b) Is Limited and Must Be Harmonized with Other Federal Law.

Reading the briefs of Celotex and Northbrook, one would think that there are simply no practical limits to the exercise of bankruptcy jurisdiction under § 1334(b), so long as the bankruptcy court invokes § 105 in aid of its jurisdiction.¹⁵ Celotex contends that because the bankruptcy court

¹⁴ More precisely, Celotex had a contingent interest in the collateral securing its reimbursement obligation to Northbrook in the event that Northbrook paid on the bond.

¹⁵ Section 105(a) itself is not a jurisdictional grant; as 11 U.S.C. § 105(c) makes clear, in order for a bankruptcy court to issue an order under § 105(a), it must have jurisdiction under some provision of title 28. *In re Wolverine Radio Co.*, 930 F.2d 1132, 1140 n.13 (6th Cir. 1991), *cert. dismissed*, 112 S. Ct. 1605 (1992). And as this Court has recognized, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). Accordingly, the lower courts have noted that § 105 does not give the bankruptcy court "power to create substantive rights under the Code," *In re Morristown & Erie R.R.*, 885 F.2d 98, 100 (3d Cir. 1989), or "free-floating discretion to redistribute rights in accordance with [its] personal views of fairness, however enlightened those views

had subject matter jurisdiction over the Celotex bankruptcy itself (a self-evident proposition that neither the Edwards nor the Fifth Circuit disputed), the bankruptcy court also had both jurisdiction under § 1334(b), and power under § 105, to issue any order purportedly related to the bankruptcy. Celotex Br. at 27. Northbrook similarly submits that because the Edwards' motion to enforce the bond could "conceivably," albeit indirectly, affect Celotex's bankruptcy estate, the bankruptcy court's stay order was an authorized exercise of its jurisdiction under § 1334(b). Northbrook Br. at 18 n.8.

Both Celotex and Northbrook interpret § 1334(b)'s grant to bankruptcy courts of jurisdiction over proceedings "related to" bankruptcy cases far too broadly. It is true, as Celotex and Northbrook emphasize, that in enacting § 1334(b) and its predecessor,¹⁶ Congress intended to expand the jurisdiction of the bankruptcy courts. But the expansion was from an extremely narrow base; the jurisdiction of bankruptcy courts under prior law was quite

might be," *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 791 F.2d 524, 528 (7th Cir. 1986).

¹⁶ Congress enacted 28 U.S.C. § 1471(b), as part of the Bankruptcy Reform Act of 1978. That statute authorized federal district courts to exercise jurisdiction over civil proceedings "related to cases under title 11." Section 1471(c) in turn vested that jurisdiction in Article I bankruptcy courts. After the Supreme Court found the complete delegation of bankruptcy jurisdiction to Article I courts to be unconstitutional in *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), Congress repealed § 1471 in its entirety and in its place enacted § 1334 as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 333. The grants of jurisdiction to district courts under § 1471(b) and § 1334(b) are identical. *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 787 (11th Cir. 1990); *In re Wood*, 825 F.2d 90, 92-93 (5th Cir. 1987).

limited. The old Bankruptcy Act of 1898 authorized the bankruptcy courts to exercise in rem jurisdiction only over "property over which the debtor had actual or constructive possession." *Katchen v. Landy*, 382 U.S. 323, 327 (1966). Bankruptcy courts could exercise jurisdiction over property in which the debtor had solely an equitable interest only with the consent of the parties. *Id.* at 328. By extending bankruptcy jurisdiction to matters "related to" bankruptcy cases, Congress intended to eliminate the "idea of possession and consent as bases for jurisdiction," and to provide bankruptcy courts with "in personam as well as in rem jurisdiction in order that they may handle everything that arises in a bankruptcy case." S. REP. NO. 989, 95th Cong., 2d Sess. 153 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5939 (emphasis added); accord H.R. REP. NO. 95-595, 95th Cong., 2d Sess. 47-48, reprinted in 1978 U.S.C.C.A.N. 5787, 6009 (noting Congress' intent to "confer jurisdiction over all litigation having a significant connection with bankruptcy") (emphasis added).

But nothing in the language or legislative histories of § 1334(b) and its predecessor, or in the cases interpreting the jurisdictional grant, indicates that Congress intended to endow bankruptcy courts with jurisdiction to issue orders that have no significant connection with bankruptcy or cannot affect the bankrupt party's estate. On the contrary, the courts have recognized that "Congress must have intended to put some limit on the scope of 'related to' jurisdiction." *Turner v. Ermiger (In re Turner)*, 724 F.2d 338, 341 (2d Cir. 1983) (emphasis added); accord *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 161 (7th Cir. 1994) (although "[t]aken at its full breadth," § 1334(b) would allow the exercise of bankruptcy jurisdiction over a products liability claim against the purchaser of assets

in a bankruptcy sale, "the language should not be read so broadly"); *In re Xonics*, 813 F.2d 127, 131 (7th Cir. 1987) ("The bankruptcy jurisdiction [under § 1334(b)] is designed to provide a single forum for dealing with all claims to the bankrupt's assets. It extends no farther than its purpose").

Accordingly, this Court has recognized that the broad language of § 1334(b) does not provide bankruptcy courts with unbridled jurisdiction to enjoin proceedings in other forums that may affect the debtor. In *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32, 112 S. Ct. 459 (1991), the Court considered whether the jurisdictional grant in 28 U.S.C. § 1334(b) permitted a district court sitting in bankruptcy to enjoin two prepetition administrative proceedings brought by the Federal Reserve System against the debtor for violation of banking regulations. The Court held that the district court "lacked jurisdiction to enjoin either regulatory proceeding." 112 S. Ct. at 461. The Court first noted that administrative proceedings to enforce a governmental unit's police or regulatory power are expressly exempted from the automatic stay provisions of the Bankruptcy Code by 11 U.S.C. § 362(b)(4). *Id.* at 463-64. The Court rejected MCorp's contention that the administrative proceedings were acts to obtain or exercise control over property automatically stayed under §§ 362(a)(3) and 362(a)(6) of the Bankruptcy Code, noting that although the proceedings may ultimately affect the bankruptcy court's control over the property of the estate, "that possibility cannot be sufficient to justify the operation of the stay against an enforcement proceeding that it expressly exempted by subdivision (b)(4)." *Id.* at 464 (emphasis in original).

The Court then rejected MCorp's contention that the bankruptcy court could exercise concurrent jurisdiction over the administrative proceedings under § 1334(b), reasoning that maintenance of the proceedings "seem[ed] unlikely to impair the Bankruptcy Court's exclusive jurisdiction over the property of the estate protected by 28 U.S.C. § 1334(d)." *Id.* at 465. The Court acknowledged that if and when the Board sought to enforce an administrative order against the bankruptcy estate itself, "then it may well be proper for the Bankruptcy Court to exercise its concurrent jurisdiction under 28 U.S.C. § 1334(b)." *Id.* at 464. But because the proceedings themselves would not directly affect the bankruptcy estate, the Court explained, 28 U.S.C. § 1334(b) did not vest the district court with jurisdiction to enjoin them. *Id.* at 465.

Moreover, the Court held, § 1334(b) should not be interpreted to conflict with or supersede another more specific provision of federal law. The Financial Institutions Supervisory Act of 1966, the Court noted, included the provision that "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any [Board] notice or order." *Id.* at 463 (quoting 12 U.S.C. § 1818(i)(1)). The plain language of § 1334(b), which purports to apply "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts," and which was enacted as law *after* the passage of 12 U.S.C. § 1818(i)(1), would appear to support that provision. Nonetheless, the Court concluded that "the specific preclusive language in 12 U.S.C. § 1818(i)(1) is not qualified or superseded by the general provisions governing bankruptcy proceedings on which MCorp relies." *Id.* at 465.

As in *MCorp*, the proceedings in this case purportedly enjoined by the bankruptcy court did not directly affect the bankruptcy estate. As the bankruptcy court and the Fifth Circuit agreed, Celotex no longer had any cognizable right to or interest in the supersedeas bond at the time of the bankruptcy. Thus, as in *MCorp*, the motion to execute against Northbrook would not "impair the bankruptcy court's exclusive jurisdiction over the property of the estate protected under § 1334(d)."

More importantly, as in *MCorp*, the scope of bankruptcy jurisdiction under § 1334(b) should be interpreted with reference to other federal law.¹⁷ In *MCorp*, the Court recognized that although § 1334(b)'s grant of bankruptcy jurisdiction is virtually limitless in its terms,¹⁸ it should not be read to conflict with or supersede the preclusive language of 12 U.S.C. § 1818(i)(1). Similarly, the Edwards contend, § 1334(b) should not be read to conflict with Federal Rules 62(d) and 65.1 and with the historical understanding and traditional function of supersedeas bonds.

¹⁷ Cf. *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1765 (1994), discussed in this Brief *infra* at 46-47, in which this Court noted that the substantive provisions of the Bankruptcy Code "will be construed to adopt, rather than to displace, state law," absent a clear showing of contrary legislative intent.

¹⁸ One commentator has observed that under the terms of the statute, "[c]onceptually, there is no limit to the reach of this jurisdiction." 1 COLLIER ON BANKRUPTCY ¶ 3.01[1][e] (15th ed. 1983).

2. In View of the History and Purpose of Supersedeas Bonds, Congress Could Not Have Intended To Authorize the Exercise of Bankruptcy Jurisdiction over Claims on Supersedeas Bonds Made Solely Against Non-Debtors.

As this Court recognized more than a century ago, the practice of requiring a judgment debtor to post a bond in order to obtain a stay of execution pending appeal arose from statutes enacted in England in the seventeenth century. *Omaha Hotel Co. v. Kountze*, 107 U.S. 378, 381-84 (1883).¹⁹ Prior to the enactment of these statutes, English common law did not require the posting of a bond to stay execution of a judgment; the writ of error itself served to supersede the judgment by directing that a writ of execution not be issued. *Id.* at 381. Recognizing the increasing tendency for judgment debtors to seek writs of error solely for purposes of delay, Parliament enacted statutes requiring the posting of "bail" to stay execution of a judgment pending appeal. ROSCOE POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 49 (1941). A statute of James I, enacted in 1606, provided that no execution should be stayed on any writ of error

unless the person or persons in whose name or names such writ of error shall be brought, with two sufficient sureties, such as the court wherein the judgment is given shall allow of, shall first be bound unto the party for whom the judgment is given, by recognizance to be acknowledged in the same court, in double the

¹⁹ See ROSCOE POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 47-51 (1941) for an exhaustive description of bonding practice in England prior to the American Revolution.

sum adjudged to be recovered by the former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay, if the said judgment be affirmed, or the writ of error nonprossed, all and singular the debts, damages and costs adjudged upon the former judgment, and all costs and damages to be awarded for the delaying of execution.

3 James I, c.8 (1606). Two statutes of Charles II extended this measure to apply to all judgments after verdict on personal actions. POUND, *supra*, at 50 n.1 (citing 16 & 17 Charles II, c.8 (1665) and 22 & 23 Charles II, c.4 (1671)). Much of the ceremonious language in today's supersedeas bonds, such as the requirement that the appeals be prosecuted "with effect," is derived from these English statutes.

In this country, the obligations of a surety on a supersedeas bond were originally governed by statute. Section 22 of the Judiciary Act of 1789, 1 Stat. 73, 85, required courts staying execution of a judgment to take "good and sufficient security" that the plaintiff in error "shall prosecute his writ to effect, and answer all damages and costs, if he fails to make his plea good." This statute was interpreted to have "the same effect as the recognizance required by the English statutes, and was intended to secure payment of the original judgment, as well as damages for delay." *Kountze*, 107 U.S. at 386-87 (citing *Catlett v. Brodie*, 22 U.S. (9 Wheat.) 553 (1824)). This provision was later recodified as § 1000 of the Revised Statutes, retaining its purpose "to indemnify the party prevailing in the original suit against loss in the respects stated in the bond, by reason of an ineffectual attempt to reverse

the holding of the trial court." *Crane v. Buckley*, 203 U.S. 441, 446 (1906).

Because the posting of supersedeas bonds had been authorized and governed by statute, this Court recognized that such bonds were more than simple contracts between the judgment creditor, the judgment debtor, and its surety. For example, in *Kountze*, the Court held that rentals lost during the pendency of an appeal of a judgment in a foreclosure case were not recoverable under the supersedeas bond posted in the case, even though the language of the bond authorized such a recovery. The Court reasoned that

[a]s an appeal bond, or bond in error, is a formal instrument required by the law and governed by the law, and has, by nearly a century's use, become a formula in legal proceedings, with a fixed and definite meaning, and as the important right of appeal is greatly affected by it, we think that it is not allowable, in practice, by a change in its phraseology, to give to it an effect contrary to what the statute intended. It would be against the policy of the law to allow such deviations and irregularities to creep in.

107 U.S. at 395. Similarly, in *American Surety Co. of New York v. Schultz*, 237 U.S. 159 (1915), the Court ruled that an action by a judgment creditor (Schultz) against the surety on a supersedeas bond securing a federal judgment was an action arising under federal law, over which a federal district court could exercise subject matter jurisdiction even in the absence of diversity of citizenship. Distinguishing the action to enforce the supersedeas bond from "an ordinary action on a sealed instrument voluntarily given," *id.* at 159, the Court observed that

while in a sense the supersedeas bond was the contract of the Surety Company, it was not made in pursuance of any agreement with Schultz, and could have been given over his objection, since the laws of the United States . . . declared that a writ of error could be obtained by the defendant filing an approved bond with surety, conditioned to make good his appeal. Such a bond operated to stay the judgment. Conversely, when that judgment was affirmed, the same laws of the United States gave Schultz a right of action on the bond, and in the suit to enforce that right the measure of the recovery depended upon the construction to be given the Federal statute.

Id.

In 1938, Congress replaced the relevant statutory provisions governing supersedeas bonds with Rules 62(d), 73(d) and 73(f) of the Federal Rules of Civil Procedure. Rule 73(f) had no statutory antecedent. It was intended to "provide[] a remedy in addition to any other remedies against sureties." FED. R. CIV. P. 73(f) advisory committee's note. In 1966, Congress incorporated the provisions of Rule 73(f) into new Rule 65.1 in order to provide a "single comprehensive rule" permitting "summary proceedings against sureties on bonds required or permitted by the rules." FED. R. CIV. P. 65(c) advisory committee's note to 1966 amendment. The remainder of Rule 73 was abrogated in 1968 with the adoption of the Federal Rules of Appellate Procedure. Although the specific provisions of Rule 73(d) concerning the form and amount of the bond were not incorporated in any other rule, courts have continued to look to the rule as a "useful guide on these matters." 11 CHARLES A. WRIGHT & ARTHUR R. MILLER,

FEDERAL PRACTICE AND PROCEDURE § 2905, at 327 (1973). Additionally, courts have recognized that they have "inherent power" to control the form and amount of security posted to stay enforcement of a judgment. *Id.* at 328; see also *C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F. Supp. 501, 520 (E.D. Pa. 1973); *Trans World Airlines, Inc. v. Hughes*, 314 F. Supp. 94, 96 (S.D.N.Y. 1970), *aff'd*, 515 F.2d 173 (2d Cir. 1975).

Although the posting of supersedeas bonds is now governed by rule rather than by statute, the posting of a supersedeas bond in federal court continues to vest federally-recognized rights in both judgment debtors and judgment creditors. See, e.g., *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 87 S. Ct. 1 (Harlan, Circuit Justice 1966) ("a party taking an appeal from the District Court is entitled to a stay of a money judgment as a matter of right if he posts a bond in accordance with" the applicable federal rules) (emphasis added); *Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n*, 636 F.2d 755, 759 (D.C. Cir. 1980) (holding that the Federal Rules of Civil Procedure entitle a judgment creditor to "a full supersedeas bond . . . in normal circumstances" because "the purpose of the supersedeas bond is to secure the appellee from loss resulting from the stay of execution"). Rules 62(d) and 65.1, like their statutory antecedents, balance the interest of judgment debtors in delaying execution pending appeal against the interest of judgment creditors in insuring that the judgment will be just as collectible when it is finally affirmed as it was when it was entered. Rule 62(d) allows judgment debtors to obtain a stay of execution as a matter of right, but only if they protect judgment creditors from harm resulting from delay by causing a surety

to become independently liable on the judgment. Rule 65.1 affords further protection for judgment creditors by providing that the liability of the surety may be determined summarily and enforced quickly.

The state courts, like the federal courts, permit the posting of a supersedeas bond to suspend enforcement of a judgment as a fundamental protection for both judgment creditors and judgment debtors. 4 AM. JUR. 2D *Appeal and Error* § 369 (1962); 4 C.J.S. *Appeal and Error* § 409 (1993). Although the procedures for posting and enforcing the bonds vary from state to state,²⁰ the dual purpose of the bonds remains the same: to protect the judgment debtor against the risk of immediate but erroneous enforcement of the judgment, while protecting the judgment creditor from changed circumstances during appeal that would vitiate the creditor's ability to collect on the judgment.

In recognition of the purpose of supersedeas bonds, the courts, with the sole exception of the Celotex bankruptcy court, have universally concluded that obligations of third parties under supersedeas bonds posted by a judgment debtor before filing for bankruptcy protection are not property of the bankruptcy estate and should not

²⁰ Texas, for example, provides an even more streamlined mechanism for enforcing supersedeas bonds than does FED. R. CIV. P. 65.1. In recognition of the independent liability that the surety assumes by executing a supersedeas bond, the surety on a supersedeas bond filed in a Texas court becomes a named party to the appellate judgment that affirms the trial court's award. TEX. R. APP. P. 82. Upon completion of the appeal, the judgment creditor need not even file a motion to enforce the judgment against the surety, but need only execute the appellate judgment against the surety.

be impaired by the bankruptcy court.²¹ These decisions come both from bankruptcy courts and from state and federal courts of general jurisdiction determining the effect of bankruptcy filings on cases before them, and they interpret both the old Bankruptcy Act and the 1978 Bankruptcy Code with its expanded definition of "property of the estate," 11 U.S.C. § 541. More significantly, two of these decisions cite the Celotex bankruptcy court's June 13, 1991 decision staying enforcement of supersedeas bonds, but expressly reject its reasoning. See *Keene Corp. v. Acstar Ins. Co. (In re Keene Corp.)*, 162 B.R. 935, 946 (BANKR. S.D.N.Y. 1994) (rejecting the Celotex bankruptcy court's analysis, "whatever merit this approach has as a case management technique," reasoning that if rights under a supersedeas bond "cannot be denied, they should not be delayed");²² *Southmark Corp. v. Riddle (In re*

²¹ In chronological order, these decisions are *Saper v. West*, 263 F.2d 422 (2d Cir.), cert. denied, 360 U.S. 916 (1959); *Mid-Jersey Nat'l Bank v. Fidelity-Mortgage Invs.*, 518 F.2d 640 (3d Cir. 1975); *Atlantic Richfield Co. v. Good Hope Refins.*, 604 F.2d 865 (5th Cir. 1979); *Moran v. Johns-Manville Sales Corp.*, 28 B.R. 376 (Bankr. N.D. Ohio 1983); *Grubb v. FDIC*, 833 F.2d 222 (10th Cir. 1987); *Carter Baron Drilling v. Excel Energy Corp.*, 76 B.R. 172 (D. Colo. 1987); *Carter Real Estate & Dev., Inc. v. Builder's Serv. Co.*, 718 S.W.2d 828 (Tex. Ct. App. 1988); *J.M. Beeson Co. v. Sartori*, 553 So. 2d 180 (Fla. Ct. App. 1989); *W.W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So. 2d 1348 (Fla. 1989); *Southmark Corp. v. Riddle (In re Southmark Corp.)*, 138 B.R. 820 (Bankr. N.D. Tex. 1992); and *Keene Corp. v. Acstar Ins. Co. (In re Keene Corp.)*, 162 B.R. 935 (Bankr. S.D.N.Y. 1994).

²² The *Keene* court held in a subsequent contempt proceeding that it had jurisdiction to restrain temporarily the enforcement of escrow agreements created to secure judgments against *Keene* pending its determination of whether *Keene* had a property interest in the escrows. *Keene v. Acstar Ins. Co. (In re Keene*

Southmark), 138 B.R. 820, 827-28 (BANKR. N.D. Tex. 1992) (rejecting the Celotex bankruptcy court's analysis by noting that "[t]he principal risk against which such bonds are intended as a protection is insolvency. To hold that the very contingency against which they guard shall, if it happens, discharge them, seems to us bad law and worse logic").

Northbrook's characterization of Celotex bankruptcy court's interference with enforceable supersedeas bonds as "novel," see Northbrook Br. at 24, then, is an understatement; the Celotex bankruptcy court's order regarding supersedeas bonds is a radical departure from prior law and has been repudiated by every other bankruptcy court that has considered it. But, as Celotex and Northbrook properly insist, the issue before this Court is not whether the bankruptcy court's interference with proceedings is proper or erroneous, but whether the court had the jurisdiction to do so.

In light of the history and purpose of supersedeas bonds, Congress could not have intended to authorize the exercise of bankruptcy jurisdiction under § 1334(b) to interfere with the enforcement of supersedeas bonds posted under the Federal Rules of Civil Procedure or under the law of any state. As the Fifth Circuit recognized below, the state and federal rules allowing stays of

Corp.), 168 B.R. 285 (Bankr. S.D.N.Y. 1994). The *Keene* court did not hold, as Northbrook implies in its Brief at 22, that it had jurisdiction to restrain execution on property after it had determined that *Keene* had no interest. In any event, the *Keene* court did not analyze the scope of its jurisdiction under § 1334(b) to enjoin a proceeding not involving the debtor or potentially affecting the debtor's property.

execution as a matter of right upon the posting of supersedeas bonds would be eviscerated if § 1334(b) were interpreted to allow bankruptcy courts to exercise jurisdiction in order to interfere with the enforcement of the bonds. Federal Rules 62(d) and 65.1, and the supersedeas bond that Celotex posted to invoke them, promised the Edwards more than just a different, but equally contingent, source of payment if their judgment were affirmed. These rules and that bond promised the Edwards, in Celotex's words, "a streamlined procedure"²³ for recovering against Northbrook, and guaranteed the Edwards that they would not have to fight to enforce their rights under the bond in a distant forum. In betting parlance, Congress aimed to provide judgment creditors not just a "sure thing" but also a "fast track."²⁴ The promise made to the Edwards in the supersedeas bond and the Federal Rules, and thousands of promises like them made every day in the state and federal courts, would be undercut by a construction of § 1334(b) that allowed a federal bankruptcy court to exercise jurisdiction over a claim to a supersedeas bond by one non-party to a bankruptcy against another.

Celotex's argument that Congress intended, in its general grant of jurisdiction to the bankruptcy courts under § 1334(b), to undermine the protections of Rules 62(d) and 65.1 is not tied to any statutory language, not supported by any legislative history, and not endorsed by any court other than the one presiding over Celotex's

²³ Celotex Br. at 37.

²⁴ Rule 65.1 even specifies the track by providing that the surety on a supersedeas bond "submits to the jurisdiction of the court" in which the bond is posted.

bankruptcy. It is also unsupported by common sense. Acceptance of Celotex's contention that a bankruptcy court has jurisdiction to enjoin the enforcement of obligations under supersedeas bonds posted in other courts would seriously damage the federal and state judicial systems in at least three significant respects:

- Such a decision would make it harder for defendants to obtain stays of execution.

A reversal in this case might delight Celotex, but it would also disappoint defendants and judgment debtors generally. As the Tenth Circuit observed in *Grubb v. FDIC*, 833 F.2d 222 (10th Cir. 1987), if the bankruptcy of the judgment debtor were to impair the judgment creditor's ability to execute on the supersedeas bond, defendants in civil cases would ultimately suffer. Recognizing that a trial court has discretion not to approve a bond offered to obtain a stay under Rule 62(d) if the bond does not provide the judgment creditor with adequate protection, the *Grubb* court predicted that

trial courts would not grant stays of execution to potentially insolvent national banks, because any supersedeas bond posted by such a bank would not serve the purpose for which these bonds are intended. Instead, the banks would be forced to pay trial court judgments immediately, possibly driving them further toward insolvency.

833 F.2d at 227 n.3.

The *Grubb* court's prophesy is already coming to pass in the wake of the Celotex bankruptcy court's rulings. Courts in at least two states, aware of the Celotex

bankruptcy court's decisions on supersedeas bonds, have ruled that the customary supersedeas bond posted by the defendants is inadequate security because of the possibility that the defendant will seek bankruptcy protection and render the bonds worthless. *Owens-Corning Fiberglas Corp. v. Carter*, 630 A.2d 647 (Del. 1993); *Hyland v. Keene Corp. (In re Asbestos Litig.)*, No. 90C-MY-261, 1992 WL 310216 (Del. Super. Ct. Aug. 10, 1992); *Cardenas v. Owens-Corning Fiberglas Corp.*, No. 94-CA-606 (Colo. Ct. App. 1994), *aff'g* No. 93-CV-58-2 (Colo. Dist. Ct., Boulder, Apr. 20, 1994), *described in* 9 MEALEY'S LITIGATION REPORTS, ASBESTOS, No. 8, at 3, A-1 (May 20, 1994). The courts in these cases required the defendant to post a cash deposit with the court in order to obtain a stay. *Id.* Whether that type of security is any more immune from the jurisdiction of a bankruptcy court under Celotex's theory than the Edwards' supersedeas bond is in this case is open to debate, but the impulse of trial courts to protect judgment creditors from the effects of defendants' possible future insolvency is not. If this Court were to interpret § 1334(b) to enable a bankruptcy court to exercise jurisdiction over proceedings involving supersedeas bonds, rulings like those cited above would proliferate, to the prejudice of defendants in all types of civil cases.

- Such a decision would create a new task for the courts – management of post-judgment discovery concerning the obligations supporting a supersedeas bond.

If the Court were to allow bankruptcy courts to exercise jurisdiction over any proceedings involving a supersedeas bond based on the allegation that the bond is collateralized with the judgment debtor's property, trial

courts may simply require defendants in civil cases to post *unsecured* bonds – that is, bonds obtained through payment of a flat, nonrefundable fee to the surety rather than through the granting of a security interest in the debtor's property. As the Edwards have pointed out, Celotex did not volunteer to disclose the arrangement under which it obtained the supersedeas bond from Northbrook. Judgment creditors would have to obtain this type of information through discovery, which the federal and state courts would have to supervise. The effect on the courts would be immediate; judgment creditors in all cases *now on appeal* in the federal and state systems would be well-advised to seek discovery on the nature of the relationship between the judgment debtor and its surety on the supersedeas bond and, if necessary, to move to set aside the bond as inadequate security for the judgment. It is inconceivable that in enacting § 1334(b), Congress contemplated burdening the federal courts with the need to monitor this new type of discovery. Yet if Celotex's theory of unlimited bankruptcy jurisdiction were adopted and the holding below disturbed, such discovery would become an unwelcome, but undoubtedly routine, task for the courts.

- Such a decision would erode the confidence of litigants in the integrity of the judicial process.

As the Fifth Circuit subtly but poignantly noted, this case does not involve merely a promise from one private party to another. Rather, this case involves a series of commitments made to and by the court itself. Celotex, the Fifth Circuit noted, "made a promise to the prevailing plaintiffs (*and the court*) by posting the supersedeas bond

that the bond would 'secure the prevailing party against any loss sustained as a result of being forced to forgo execution on a judgment during the course of an ineffectual appeal.'" 6 F.3d at 319, P.A. 17 (emphasis added) (quoting *Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979)). In turn, the Edwards "were specifically promised by the court and by Celotex that they could look to the supersedeas bonds if they won on appeal." 6 F.3d at 320, P.A. 20 (emphasis added). The Court should be reluctant to interpret the jurisdictional grant of § 1334(b) in a way that would subvert these judicial promises.

* * *

Finally, Celotex contends that to the extent that the federal rules governing supersedeas bonds conflict with substantive rights conferred under the Bankruptcy Code, the federal rules must "give way." Celotex Br. at 39. But there is no such conflict, any more than the statute withdrawing jurisdiction to enjoin administrative proceedings considered by the Court in *MCorp* conflicted with the broad but general grant of bankruptcy jurisdiction in § 1334(b). The Edwards merely contend that here, as in *MCorp*, the jurisdictional inquiry of whether a proceeding is "related to" a bankruptcy must be informed by a comprehensive understanding of federal law and historical practice.

3. Celotex's Commencement of a Frivolous Adversary Proceeding Against Northbrook and the Edwards Almost Two Years After the Bankruptcy Court Issued Its Stay Order Did Not Give the Bankruptcy Court After-the-Fact Justification To Exercise Jurisdiction over Proceedings Involving the Bond.

Twenty-one months after the bankruptcy court issued its stay order and more than three years after Northbrook acceded to Celotex's request and executed a supersedeas bond in favor of the Edwards, Celotex filed an adversary proceeding in the bankruptcy court seeking to set aside that supersedeas bond. Celotex did not single out the Edwards in this action – Celotex sued *all* 229 beneficiaries of the more than 100 supersedeas bonds that it had posted before the bankruptcy on which its sureties were potentially liable. In its adversary proceeding, Celotex essentially claims that every supersedeas bond that it had posted before it filed for bankruptcy is a "constructive fraudulent transfer" and should therefore be invalidated by the bankruptcy court. Celotex maintains that the bankruptcy court's need to protect Celotex's claim to the property sought in the adversary proceeding necessitates the bankruptcy court's exercise of jurisdiction to stay enforcement of the supersedeas bonds against the sureties. Celotex Br. at 44-45. Northbrook advances the same argument, wishfully characterizing the stay order as an "interlocutory adjunct" to the adversary proceeding, over which the bankruptcy court "unquestionably" has core bankruptcy jurisdiction under 28 U.S.C. § 157. Northbrook Br. at 19.²⁵

²⁵ Although Celotex's adversary proceeding may be a "core proceeding" under 28 U.S.C. § 157, the Edwards vigorously

But the argument that because the bankruptcy court has jurisdiction over the adversary proceeding, it also has jurisdiction to enjoin the Edwards' claim against Northbrook, fails for two reasons. Primarily, and most obviously, the stay order was issued *not* as an "interlocutory adjunct" to the adversary proceeding, but as part of the bankruptcy court's general effort to bring "stability" to Celotex's bankruptcy case. 128 B.R. at 483, P.A. 43. The reliance of the bankruptcy court on the bankruptcy itself, rather than the adversary proceeding, to support its jurisdiction to enter the stay order is made clear by both direct and circumstantial evidence:

- the stay on execution of supersedeas bonds was issued, and reaffirmed twice, *before* Celotex commenced its adversary proceeding;

dispute Northbrook's gratuitous suggestion that the proceeding involves "the restructuring of debtor-creditor relations" rather than "the adjudication of state-created private rights." Northbrook Br. at 19 n.9 (quoting *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 71 (1982)). The Edwards have not filed a claim in the Celotex bankruptcy; the purpose of Celotex's adversary proceeding is to invalidate the Edwards' rights against Northbrook under state fraudulent conveyance law. Celotex's adversary proceeding does not seek the equitable distribution of its assets among its creditors but seeks to recoup additional funds from non-parties for the benefit of the bankruptcy estate. Because the Edwards have not filed claims against the Celotex bankruptcy estate, Celotex's adversary proceeding did not arise "as part of the process of allowance and disallowance of claims" and cannot be considered "integral to the restructuring of debtor-creditor relations." *Granfinanciera v. Nordberg*, 492 U.S. 33, 58 (1989).

- the stay order bears the caption of the bankruptcy case only, and not the caption of the adversary proceeding;
- the stay order does not identify any particular parties enjoined, as required by FED. R. BANKR. P. 7065 and FED. R. CIV. P. 65;
- the bankruptcy court expressly acknowledged in its omnibus stay order of June 13, 1991 that the stay was not connected with any adversary proceeding (indeed, Celotex would not file an adversary proceeding for almost two years), but was intended generally "to insure the integrity of the bankruptcy system and to protect the debtor in the initial stages" of the bankruptcy proceeding, 128 B.R. at 482 n.10, P.A. 40, n.10; and
- in its order declining to lift the omnibus stay on proceeding against supersedeas bonds, the bankruptcy court stated that its stay order was supported *not* by the probability that Celotex would prevail on the merits of its claims in its anticipated adversary proceeding, but by the probability that Celotex would "preserve the estate while simultaneously protecting or avoiding the claims of the judgment creditors." 140 B.R. at 914, P.A. 51.

The bankruptcy court's jurisdiction over the adversary proceeding did not vest – retroactively – the bankruptcy court with jurisdiction to enter a stay order that it was not otherwise authorized to enter.

The second reason that the filing of the adversary proceeding will not support the bankruptcy court's exercise of jurisdiction to stay the Edwards' attempt to

enforce the supersedeas bond against Northbrook is that the proceeding, at least insofar as it relates to the Edwards, is frivolous. Celotex contends that through its adversary proceeding, Northbrook's liability to the Edwards under the supersedeas bond could be reduced or eliminated under two theories. Celotex Br. at 9, 44. First, Celotex suggests that the bankruptcy court could disallow or subordinate the punitive damages component of the Edwards' claim against Celotex under 11 U.S.C. §§ 510(c), 726(a)(4), and 1129(a)(7), and thereby reduce Northbrook's liability to the Edwards. Second, Celotex asserts that the bankruptcy court could invalidate the supersedeas bond as a "constructively fraudulent conveyance[]" under 11 U.S.C. § 544 (in conjunction with applicable Florida law) because in posting the bond Celotex supposedly did not receive "reasonably equivalent value" for its indirect transfer to the Edwards. The first of these theories is belied by the plain language of the Code provisions upon which Celotex relies; the second is so internally illogical, so lacking in support in precedent, and so offensive to federal and state law authorizing the posting of supersedeas bonds to stay execution of judgments that it cannot possibly support the stay order.

As the Edwards have repeatedly noted, they have not asserted *any* claim against Celotex, much less a claim for punitive damages. Their claim under the supersedeas bond is against Northbrook and Northbrook alone. The Code provisions cited by Celotex that authorize disallowance or equitable subordination of claims apply by their terms only to claims against the debtor that would be satisfied out of the bankruptcy estate. See 11 U.S.C. § 502 (applicable to claims, "proof of which is filed under section 501 of this title"); 11 U.S.C. § 726 (describing the

way in which "property of the estate shall be distributed" (emphasis added)); 11 U.S.C. § 1129(a)(7) (describing effect of confirmation on "a holder of a claim" against the debtor). If any doubt as to the bankruptcy court's inability to disallow or equitably subordinate claims made against non-debtors remains after reading those provisions, it is eliminated by 11 U.S.C. § 524(e). That section specifically provides that, absent certain exceptions inapplicable here, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." Thus, regardless of how the bankruptcy court resolves Celotex's adversary action to disallow or equitably subordinate punitive damages claims, it cannot possibly affect the Edwards' claim against Northbrook on the supersedeas bond.²⁶

Celotex's second contention – that the supersedeas bond in favor of the Edwards may be avoided as a "fraudulent conveyance" – is even more bizarre. Celotex's argument hinges on the suggestion that Celotex did not receive "reasonably equivalent value" for posting the bond because "the recipient [presumably the Edwards] gave *no* value" to Celotex. Celotex Br. at 44 (emphasis in original). Such a contention defies the unambiguous terms of 11 U.S.C. § 548(d)(2)(A), which specifically defines value to include "the satisfaction or securing of a present or antecedent debt of the debtor." 11 U.S.C. § 548(d)(2)(A) (emphasis added). Moreover, Celotex's

²⁶ See *Keene Corp. v. Acstar Ins. Co. (In re Keene)*, 162 B.R. 935, 945-49 (Bankr. S.D.N.Y. 1994) (rejecting debtor's contention that disallowance or equitable subordination of punitive damage portions of final judgments against debtor could affect sureties' liability under supersedeas bonds, and thus denying injunction against enforcing the bonds against the sureties).

contention that the stay of execution that it sought and obtained under Rule 62(d) by posting the bond was not "reasonably equivalent value" for any indirect transfer that it made to the Edwards in order to obtain the stay is irreconcilable with this Court's recognition that the very purpose of supersedeas bonds is to benefit the judgment debtor by preventing immediate execution. *See, e.g., American Surety Co. of New York v. Schultz*, 237 U.S. 159, 162 (1915) (noting that the stay obtained by posting a supersedeas bond "was helpful to the defendant"). It was not the Edwards, but Celotex, that desired, and benefitted from, a stay of execution. Celotex's assertion that it did not receive value from the stay is simply untenable as a matter of common sense.

In *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757 (1994), this Court recognized that transactions regulated by state law cannot validly be attacked as fraudulent conveyances in an adversary action in a bankruptcy case. In *BFP*, the Court considered whether the sale of the debtor's mortgaged property at a foreclosure sale conducted under state law could be challenged as a fraudulent conveyance under § 548 of the Bankruptcy Code. The debtor contended that because the property was sold for far less than its fair market value, the debtor "received less than a reasonably equivalent value" in exchange for the transfer of its interest in the property within the meaning of § 548(d)(2)(A), and that the transfer was therefore avoidable. *Id.* at 1759. The Court rejected the contention, holding that the price paid for property at a state-authorized foreclosure sale conclusively establishes the "reasonably equivalent value" of the property. *Id.* at 1765. The Court noted that states have an interest in insuring the security of titles to real estate, and that state laws and procedures

regulating minimum prices at state foreclosure sales promote that interest. *Id.* at 1764-65. To allow debtors to use the bankruptcy laws to attack sales of property made in compliance with state law, the Court reasoned, "would have a profound effect upon that [state] interest: the title of every piece of realty purchased at foreclosure would be under a federally created cloud." *Id.* at 1765. Although the Court acknowledged that Congress has the power to "disrupt the ancient harmony" between foreclosure law and fraudulent conveyance law, it refused to presume a Congressional intent to disrupt that harmony, using language directly applicable to the case at bar:

The Bankruptcy Code can of course override by implication when the implication is unambiguous. But *where the intent to override is doubtful, our federal system demands deference to long established traditions of state regulation.*

Id. at 1765 (emphasis added).

Celotex's contention that Congress intended to displace time-honored state *and federal* procedures for staying and securing court judgments in enacting § 544 of the Code is even less plausible. On the contrary, it is hard to imagine that Congress intended to permit a debtor to attack as "constructively fraudulent" a transfer that the debtor had voluntarily made pursuant to state or federal law more than a year before filing bankruptcy in order to obtain a stay of execution of a judgment pending appeal.

The language of the Code, and this Court's opinion in *BFP*, expose Celotex's adversary proceeding against the Edwards as pretextual and frivolous. Thus, even if the bankruptcy court's stay order can properly be considered an "adjunct" to the adversary proceeding, which the

Edwards deny, that proceeding still did not provide a colorable jurisdictional basis for the bankruptcy court to enjoin the Edwards' action against Northbrook.²⁷

II. PRINCIPLES OF COMITY DID NOT OBLIGATE THE FIFTH CIRCUIT TO ENFORCE THE BANKRUPTCY COURT'S STAY ORDER.

Celotex correctly recites the rule stated by this Court in *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 386 (1980), that "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." But Celotex overlooks what one court has called the "principal qualification" of the GTE rule: "that the court which issued the order must have had jurisdiction to do so." *Illinois v. Department of Health & Human Services*, 594 F. Supp. 147 (N.D. Ill. 1984) (holding that because the federal court that issued a prior injunctive order had lacked jurisdiction to do so, the order was "void *ab initio*" and not binding on the litigants), *aff'd*, 772 F.2d 329 (7th Cir. 1985). Similarly, the cases upon which Northbrook relies to support its contention that comity requires deference to prior orders issued by other courts presuppose that the court entering the prior order had jurisdiction to do so. See, e.g., *Kerotest Mfg. Co. v. C-O Two Fire Equip. Co.*, 342 U.S. 180 (1952); *Lapin v. United States*,

²⁷ Indeed, if the stay order were tied to the adversary proceeding, which it was not, it could accurately be characterized as "transparently invalid" with only "a frivolous pretense to validity." *Walker v. City Birmingham*, 388 U.S. 307, 315 (1967).

333 F.2d 169 (9th Cir.), *cert. denied*, 379 U.S. 904 (1964). *Kerotest*, GTE, and their progeny are simply inapplicable in the instant case, in which the Edwards contend (and the Fifth Circuit concluded) that the bankruptcy court's order exceeded its jurisdiction and was patently invalid.

Northbrook nevertheless insists that the Fifth Circuit's decision condoning the Edwards' collateral attack on the bankruptcy court's stay order is "unseemly" and violates general "principles of comity and federal jurisdiction." Northbrook Br. at 24-25. Northbrook has it backwards. It is the bankruptcy court, by seeking to exercise jurisdiction over claims to property in which the debtor can colorably claim no interest, that has failed to accord the requisite deference to proceedings in other courts. The supersedeas bond that the Edwards seek to enforce had been duly approved by order of the court in which it was deposited. The district court in Texas that approved the bond, not the bankruptcy court in Florida, was the appropriate court to determine the Edwards' right to the bond. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976) ("the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts"); *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964) (in proceedings in rem or quasi in rem, "the state or federal court having custody of such property has exclusive jurisdiction to proceed"). The Fifth Circuit justifiably and properly disregarded the bankruptcy court's extra-jurisdictional attempt to interfere with the proceedings in Texas, which were authorized by federal law.

Celotex suggests that affirmance of the Fifth Circuit's ruling would invite "conflict and chaos," because "federal courts would be free to collaterally attack and second-guess the orders of all other such courts - simply

because the deciding court disagrees with the merits of the other court's ruling." Celotex Br. at 36. Celotex's concern is hyperbolic and unwarranted. The Fifth Circuit disregarded the bankruptcy court's order not because it simply disagreed with it, but because the bankruptcy court lacked jurisdiction or power to interfere with the rights of parties not before it. If the Fifth Circuit's decision is affirmed, collateral attacks on bankruptcy court orders will continue to be appropriate only in those rare instances where, as here, a court attempts to exercise jurisdiction clearly beyond that delegated to it by Congress.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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RULE 29.1 STATEMENT

Celotex's statement for purposes of this Court's Rule 29.1, which appears at Brief for Petitioner at ii, remains accurate.

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The Edwardses concede that the judgment of the Fifth Circuit must be reversed if the Florida bankruptcy court had subject matter jurisdiction to issue its stay of execution upon Celotex's supersedeas bonds. *See* Brief for Respondents at 16, 19-48.

Indeed, it is undisputed that Federal Rule of Civil Procedure 65.1 does not permit enforcement of a bond, where a court in another circuit has issued an order pursuant to 11 U.S.C. §105(a) staying enforcement, *unless that stay is subject to collateral attack*. *See* Brief for Respondents at 16, 19-48. In this case, the only ground advanced in support of the Edwardses' admitted collateral attack is that the Florida bankruptcy court lacked subject matter jurisdiction to issue its stay. *See id.* at 16, 19, 21-48.

The Edwardses' argument that the bankruptcy court lacked subject matter jurisdiction is without merit. The

III. WHILE THIS COURT SHOULD NOT REACH THE MERITS OF THE §105(a) STAY VIA A COLLATERAL ATTACK, THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION IN ISSUING THE STAY

As described above, this case involves an impermissible collateral attack on the Florida bankruptcy court's §105(a) stay. For this reason, this Court should not address the merits of the stay at this time, just as the Fifth Circuit should not have reviewed the merits.

This point is of particular importance to judicial administration, because the record regarding the §105(a) stay was not before the Texas district court below. The Texas district court held no hearings and received no evidence regarding the §105(a) stay;¹³ in contrast, the Florida bankruptcy court held hearings and received voluminous evidence. *Celotex II*, 140 B.R. at 914. Accordingly, the record required for informed appellate review of the §105(a) stay – and for this Court to use in setting standards for the future employment of §105(a) – is where one would expect it to be, in the Florida bankruptcy court.¹⁴

¹³ This simply illustrates that the Fifth Circuit's decision to review the merits of the stay by collateral attack is bad law and worse policy. The Fifth Circuit disapprovingly noted that materials relevant to a decision to issue the §105(a) stay were not before it. *Edwards II*, 6 F.3d at 320 n.7. However, *this very evidence* was in the record before the bankruptcy court. Compare *Edwards II*, *id.*, with *Celotex II*, 140 B.R. at 914 (discussion of bonds and agreements with sureties placed in evidence). One of the reasons for the rule against collateral attack, of course, is that the court in which the collateral attack occurs does not have the benefit of the full record made in the court which issued the order. That is precisely what happened in this case.

¹⁴ Should the Court wish, Celotex will make that record (which is voluminous) available to the Court.

The power of the bankruptcy court to issue the §105(a) stay has been demonstrated at length in Parts I.A.2.a. and c. of this Argument, and that discussion will not be repeated here. Celotex respectfully refers the Court to that discussion. Below, Celotex will briefly address the propriety of the stay on its merits in the event the Court determines that it is appropriate to review the merits.

Preliminarily, it is important to note that the abuse of discretion standard should be used to review the §105(a) stay. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975) (abuse of discretion standard should be used to review merits of preliminary injunction); *Brown v. Chote*, 411 U.S. 452, 457 (1973) (same); *American Imaging Servs., Inc. v. Eagle-Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.)*, 963 F.2d 855, 858 (CA6 1992) (abuse of discretion standard to be used in reviewing bankruptcy court's §105(a) stay of proceedings against debtor's officers); *Commonwealth Oil Ref. Co. v. United States Env'tl. Protection Agency (In re Commonwealth Oil Ref. Co.)*, 805 F.2d 1175, 1188 (CA5 1986) (abuse of discretion standard used to review denial of §105(a) stay), *cert. denied*, 483 U.S. 1005 (1987).¹⁵ In this case, it is beyond dispute that there was no abuse of discretion.

¹⁵ In *Edwards II*, the Fifth Circuit, in reviewing the advisability of the stay, never addressed the standard of review which it was to employ. To the extent that it was considering an appeal of a collateral attack, the Fifth Circuit should have reviewed the record for the existence of the three collateral attack exceptions which this Court set forth in *Walker*, *GTE Sylvania* and similar decisions. To the extent that it was reviewing the merits of the §105(a) stay, the Fifth Circuit should have employed the abuse of discretion standard it used in *Commonwealth Oil*.

A. The Bankruptcy Court's §105(a) Stay, Entered To Protect Celotex's Reorganization And All Of Its Creditors, Was Justified

The critical role of Celotex's insurance and the supersedeas bonds in Celotex's bankruptcy case has been explained in detail in the Statement of the Case. The bonded judgments alone represented \$70 million of assets otherwise available for creditors on the petition date. The bankruptcy court must determine whether some or all of those assets can be distributed to other creditors as a result of the bankruptcy.

The bankruptcy court's powers to avoid transfers and subordinate or disallow claims – under appropriate factual circumstances – are plain. Transfers of assets related to bonded judgments which fall within the preference period can and should be set aside as preferential. Transfers of assets related to bonded judgments which are constructively fraudulent conveyances (*e.g.*, a transfer on account of punitive damages is not for reasonably equivalent value, since the recipient gave *no* value), can and should be set aside as constructively fraudulent transfers under federal and state law. (The verdict, entry of judgment and posting of the bond in the *Edwardses'* civil tort action are all within Florida's four year fraudulent conveyance period, Fla. Stat. Ch. 726.110(1)-(2)). Moreover, punitive damage awards can and should be subordinated under 11 U.S.C. §510(c), 11 U.S.C. §726(a)(4) and/or the cases cited in footnote 12 of *Celotex I*. 128 B.R. at 484 n.12. Finally, executory contracts with the sureties can be rejected under 11 U.S.C. §365. As the bankruptcy court held, these debtor-creditor issues should be resolved by the bankruptcy court before the \$70 million is distributed.¹⁶ *Celotex I*, 128 B.R. at 484. If Celotex's

¹⁶ In making this determination, the bankruptcy court employed the proper standard for the grant of injunctive relief.

supersedeas bonds are executed upon, as a practical matter the bankruptcy court will lose its ability to grant effective relief with respect to these issues.

When Celotex and Carey Canada filed for relief in bankruptcy, there were approximately 140,000 asbestos claimants who were not the beneficiaries of supersedeas bonds. *Id.* at 482. As previously noted, these claimants will likely collect only a fraction of their compensatory damages – and no punitive damages. There were also approximately 100 supersedeas bonds, collateralized by nearly \$70 million worth of Celotex's assets, *id.*; *Celotex II*, 140 B.R. at 914 (explaining collateralization), posted to benefit 229 judgment claimants. Under these circumstances, as the Fourth Circuit's analysis in *Willis* illustrates, *see* 978 F.2d at 149-50, it is not an abuse of discretion for the bankruptcy court to stay execution on the bonds until it can resolve the issues currently before it for decision. Indeed, faced with these facts, it would be an abuse of discretion *not* to stay execution.

B. The Fifth Circuit's Decision Overlooks The Important Bankruptcy Policies That The §105(a) Stay Promoted

The *Edwards II* decision completely disregards the bankruptcy policy that similarly situated creditors must

See Celotex II, 140 B.R. at 914-16 (discussing and applying the Eleventh Circuit's four part standard for such relief). Celotex refers the Court to that discussion for the details regarding how the standard is met here. *See id.* Moreover, the Sixth Circuit in *Eagle-Picher* held that, in this context, the bankruptcy court need not even give any significant weight to the factor involving the debtor's ultimate likelihood of success on the merits. 963 F.2d at 859-60. Here, of course, the bankruptcy court found that Celotex made a clear evidentiary showing with regard to this factor, as well as the other three factors. *Celotex II*, 140 B.R. at 914-16. These factual findings are not clearly erroneous and thus cannot be set aside on appeal. Fed. R. Bankr. P. 8013.

be treated alike. See, e.g., *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1277 (CA5 1991) (discussing need to treat similarly situated creditors alike), *cert. denied*, 113 S. Ct. 72 (1992). Because the Fifth Circuit improperly allowed a collateral attack to succeed while the Fourth Circuit did not, Celotex's bonded judgment creditors with cases pending in the Fifth Circuit were permitted to recover upon their judgments immediately, while in the Fourth Circuit, bonded judgment creditors were required to seek relief from the Florida bankruptcy court.

Public policy mandates a centralization of authority to govern debtor-creditor relationships in a bankruptcy case. The bankruptcy court must act in the interest of the debtor's reorganization and protect the rights of *all* creditors wherever located. Thus, the bankruptcy court often will view the equities of a given situation differently from a court presiding over an isolated proceeding. The Fifth Circuit concluded, based upon a plainly inadequate record, that the equities favored a ruling that allowed two plaintiffs before it to execute upon a supersedeas bond to collect an award of punitive damages against Celotex. In so doing, the Fifth Circuit made a judgment which the Florida bankruptcy court was better positioned and qualified, as well as exclusively authorized, to make. This judgment must be made with all creditors – not just the Edwardses – in mind.

The *Edwards II* decision also overlooks the fact that the §105(a) stay merely maintains the status quo for a time and does not destroy any rights to the supersedeas bonds. The stay enables the bankruptcy court to determine whether the transfers to procure the bonds can be avoided or the claims subordinated or disallowed. It may also enable the bankruptcy court to confirm a plan of reorganization that may alter or otherwise modify payment obligations as to the affirmed judgments. See 11 U.S.C. §1123. Such bankruptcy court actions could permit

the use of Celotex's collateral to benefit all creditors. Finally, the *Edwards II* decision intruded upon the bankruptcy court's exclusive jurisdiction over Celotex's property, the cash that secures Celotex's supersedeas bonds, and the determination of what may constitute property by virtue of the avoiding powers available in a bankruptcy. See 28 U.S.C. §1334(d); see generally *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983).

The bankruptcy court is in the best position to address these complex disputed issues via a full and fair determination on the merits. See, e.g., *Celotex II*, 140 B.R. at 917 (ordering Celotex to initiate an adversary proceeding against the beneficiaries of, and sureties on, supersedeas bonds). The Fifth Circuit's decision attempts to "dispense justice" by divesting the bankruptcy court of its exclusive jurisdiction to make determinations which are *critical* to Celotex's reorganization effort. Indeed, the Fifth Circuit's decision, if affirmed, would ensure that *no* court will address these issues, on the merits, as to the Edwardses.

C. The Edwardses' Expectations Regarding The Supersedeas Bond, While Not Controlling, Have Not Yet Been Disappointed

Instead of acknowledging the many reasons favoring deference to the bankruptcy court's injunctive order, the court in *Edwards II* spoke in poignant terms about its duty to see that the Edwardses' expectations regarding Celotex's supersedeas bond were not dashed. See *Edwards II*, 6 F.3d at 320.

The Edwardses' expectations, while worthy of consideration, simply are not controlling. This Court has recognized that bankruptcy affects the settled expectations of creditors and third-parties alike. See *Whiting Pools*, 462 U.S. at 206 ("As does all bankruptcy law,

§542(a) modifies the procedural rights available to creditors to protect and satisfy their liens."); *NLRB v. Bildisco & Bildisco*, 465 U.S. at 532 ("But the filing of the petition in bankruptcy means that the collective-bargaining agreement is no longer immediately enforceable, and may never be enforceable again."). The postponement of enjoyment, or modification, of the Edwardses' pre-petition "rights" is far from unique in the Celotex bankruptcy or unusual in bankruptcies in general. *See Whiting Pools*, 462 U.S. at 206.

As matters stand today, the Edwardses are in no worse position than the day Celotex filed for bankruptcy. The Florida bankruptcy court's §105(a) stay does not discharge Celotex's supersedeas bond, nor does the stay reduce the amount of the bond. Indeed, in the exercise of its discretion to balance the claims of competing creditors, the bankruptcy court has directed Celotex to establish a reserve account as adequate protection for the bonded claimants, including the Edwardses. *Celotex II*, 140 B.R. at 917. This is an appropriate balancing of the equities.

The exact benefit that the Edwardses will ultimately obtain from Celotex's supersedeas bond has not yet been determined. However, the Edwardses' expectations regarding the bond have not yet been disappointed. The Edwardses have simply been put on hold pending resolution of the important bankruptcy issues implicated here. Meanwhile, their interests have been protected. This is eminently reasonable under difficult circumstances. It is not an abuse of discretion.

Accordingly, in the event that this Court were to conclude that the Fifth Circuit appropriately reached or could reach the merits of the bankruptcy court's §105(a) stay, this Court should hold that the bankruptcy court did not abuse its discretion in issuing its stay.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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No. 93-1504

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In The
Supreme Court of the United States
October Term, 1994

THE CELOTEX CORPORATION,
Petitioner,
v.

BENNIE EDWARDS AND JOANN EDWARDS,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENTS

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STATUTES AND RULES INVOLVED

11 U.S.C. § 105(a) provides, in pertinent part:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

28 U.S.C. § 1334(b) provides:

Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Rule 62(d) of the Federal Rules of Civil Procedure provides:

Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Rule 65.1 of the Federal Rules of Civil Procedure provides, in pertinent part:

Whenever these rules . . . require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the

bond may be served. The surety's liability may be enforced on motion without the necessity of an independent action.

STATEMENT OF THE CASE

On August 17, 1987, Respondents Bennie and Joann Edwards ("the Edwards") filed a lawsuit against Petitioner Celotex Corporation ("Celotex") and fifteen other companies in federal court in their home town of Wichita Falls, Texas. R. 1.¹ The Edwards alleged that Bennie Edwards had developed disabling lung disease as a result of his work in the State of Texas with and around asbestos insulation products made by each of the defendants or their respective predecessors in interest.² R. 1-7. As a result of his disease, the Edwards alleged, Bennie Edwards had incurred medical expenses, sustained a loss of his earning capacity, and experienced progressive physical discomfort and mental distress, and his wife Joann had suffered the loss of her husband's consortium and support. R. 10-13. The Edwards asserted that under Texas law each defendant was jointly and severally liable

¹ Citations to the record appear as "R. ____." The portions of the record included in the Appendix to Celotex's Petition for Certiorari are cited as "P.A. ____." Citations to the Joint Appendix appear as "J.A. ____." Citations to the Appendix to the Brief *Amicus Curiae* of Northbrook Property and Casualty Insurance Company appear as "N.A. ____."

² As Celotex points out in its brief at 5, its liability was predicated on its status as corporate successor to the Philip Carey Manufacturing Company, a long-time manufacturer of asbestos insulation products. J.A. 19-21.

for the Edwards' damages and independently liable for punitive damages. R. 6-10, 12.

The Edwards' case came to trial in April of 1989. All of the remaining defendants except Celotex settled with the Edwards. After a five day trial, during which Celotex vigorously challenged the Edwards' allegations of causation, liability, and damages, the jury returned a verdict awarding the Edwards \$491,000.00 in compensatory damages. R. 1291-93. The jury also assessed Celotex \$245,500.00 in punitive damages. R. 1300. Applying Texas law, the district court reduced the award of compensatory damages by the percentage of responsibility for the Edwards' injuries allocated by the jury to the defendants that had settled prior to trial. On April 17, 1989, the court entered final judgment in favor of the Edwards and against Celotex in the amount of \$35,525.80 in compensatory damages and \$245,500.00 in punitive damages. P.A. 24-25. The judgment became enforceable ten days after the entry of judgment, on April 27, 1989. FED. R. CIV. P. 62(a).

To stay execution of the judgment pending appeal, Celotex filed a supersedeas bond in favor of the Edwards executed by Northbrook Property and Casualty Insurance Company ("Northbrook") in the amount of \$294,987.88, and moved the district court to approve the bond. The bond contained the customary language "bind[ing]" Northbrook to pay the Edwards the amount specified by the bond unless Celotex "shall prosecute said appeal and answer to Bennie Edwards and Joann Edwards for all damages, interest, and cost." J.A. 12-13. Celotex's motion to approve the bond did not disclose that Celotex had obligated itself to reimburse Northbrook in the event that Northbrook was required to pay on the bond, nor did the motion reveal that Celotex had secured its reimbursement obligation to Northbrook with

property in which Celotex had an interest. The Edwards did not oppose the motion to approve the bond, and the district court approved the bond on June 5, 1989. J.A. 11. Upon approval of the bond, the stay of the judgment became effective. FED. R. CIV. P. 62(d).

On appeal, Celotex challenged the punitive damage element of the judgment as unconstitutional, excessive, and insupportable under applicable substantive law. A Fifth Circuit panel unanimously rejected Celotex's contentions, and affirmed the judgment in its entirety in an opinion and judgment issued September 20, 1990. *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151 (5th Cir. 1990), J.A. 18. Celotex did not file a motion for rehearing. Under Rule 41 of the Federal Rules of Appellate Procedure, the mandate was due to be issued on October 11, 1990. The clerk of the Fifth Circuit actually issued the formal mandate on October 12, 1990.

On the afternoon of October 12, 1990, Celotex filed a petition for reorganization under Chapter XI of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida. Under 11 U.S.C. § 362(a), the filing of the petition automatically stayed all judicial proceedings against Celotex. Because the mandate of the Fifth Circuit had issued, however, the Edwards' case was complete at the time of the bankruptcy, and the judgment was then enforceable against Celotex and its surety Northbrook.³

³ Aetna Casualty and Surety Company has filed an *amicus curiae* brief asserting that a critical "assumption" in the question accepted by the Court for review – that the Edwards' judgment against Celotex was final and enforceable at the time of Celotex's bankruptcy filing – is unsupported by the record. Aetna bases its assertion on two assumptions of its own: the legal

Five days after the bankruptcy filing, on the application of Celotex and without prior notice to the Edwards, the bankruptcy court entered an emergency ex parte order purporting to enjoin "all entities" from "commencing or continuing any judicial, administrative, or other

assumption that the Fifth Circuit's mandate was not effective to conclude the appeal and make the judgment final and enforceable until it was physically received by the district court, and the factual assumption that because the Fifth Circuit issued the mandate on the date of the bankruptcy, the district court "presumptively" did not receive the mandate until after the bankruptcy filing. Aetna Br. at 6-7. Because the case was still technically on appeal at the time of the bankruptcy, Aetna argues, the judgment never became final due to the application of the automatic bankruptcy stay, 11 U.S.C. § 362(a)(1). Aetna Br. at 8. Accordingly, Aetna contends, the Court lacks jurisdiction over this case. Aetna Br. at 9-10.

Aetna's attempt to persuade the Court to avoid the merits should fail for three reasons. First, Aetna's legal premise is incorrect: "the appellate process is terminated . . . when an appellate court issues its mandate of affirmance." *United States v. Cook*, 705 F.2d 350, 351 (9th Cir. 1983) (emphasis added); accord *United States v. DiLapi*, 651 F.2d 140, 144 n.3 (9th Cir. 1981) (relying on issuance of mandate from court of appeals as event that returned jurisdiction to the district court, even though record did not disclose when mandate from the court of appeals was received in the district court); *Newball v. Offshore Logistics Int'l*, 803 F.2d 821, 826 (5th Cir. 1986) ("[w]hen an appellate mandate is issued, a district court reacquires jurisdiction"). Second, Aetna's factual premise is wrong; the record reveals that for whatever reason, the district court actually received the judgment and mandate of the court on October 10, 1990, two days before it was formally issued. R. 1417, 1418; Docket Sheet at 16. Finally, even if the automatic stay applied to the appeal, it would not affect the finality of the order on the Edwards' subsequent motion to enforce the bond against Northbrook. Thus, this Court has jurisdiction over this proceeding, and should decide the question presented for review.

proceeding involving any of the Debtors regardless of (a) who initiated the proceeding, (b) whether the matter is on appeal and a supersedeas bond has been posted by the debtors or (c) the appellant in an appeal is one of the debtors." P.A. at 28. The order was not specifically directed to the Edwards, or to any other party in particular. Moreover, the order on its face purported to restrain only efforts to enforce judgments or debts "against the debtor or against property of the debtor," P.A. 27, and expressly refrained from enjoining actions to collect on debts owed by third parties, P.A. at 28-29, ¶ 5. As authority for the issuance of the order, the bankruptcy court cited §§ 105 and 362 of the Bankruptcy Code. P.A. 26.⁴

After the bankruptcy court issued its ex parte stay order, many plaintiffs with bonded judgments against Celotex on appeal, including some represented by counsel for the Edwards, sought clarification, modification, or

⁴ The order did not comply with the requirements for the issuance of a temporary restraining order or preliminary injunction of FED. R. BANKR. P. 7065 and FED. R. CIV. P. 65, in that

- it was issued without notice to any of the "entities" that it purported to affect, and did not state the reasons why the order was granted without notice (FED. R. CIV. P. 65(b));
- it did not expire by its terms within ten days of the date of its entry (FED. R. CIV. P. 65(b));
- it did not recite in any meaningful way "the reasons for its issuance" (FED. R. CIV. P. 65(d)); and
- it purported to bind "entities" who were not formal parties to the action (FED. R. CIV. P. 65(d)).

Indeed, though it contained injunctive language, the order was couched not as an injunction but as an order "extending" the automatic stay.

dissolution of the order.⁵ Meanwhile, claimants whose bonded judgments against Celotex had, as of the date of the bankruptcy, survived appeal and were enforceable began to attempt to execute against the sureties on the supersedeas bonds securing the judgments in the courts in which the bonds had been posted. On January 2, 1991, a federal court in Norfolk, Virginia granted a motion under Rule 65.1 of the Federal Rules of Civil Procedure by four plaintiffs to release a supersedeas bond securing a judgment against Celotex, notwithstanding the bankruptcy court's stay order.⁶ R. 1453-61. On May 3, 1991, the Edwards filed a similar motion, asking the district court in Texas to enforce the terms of the supersedeas bond executed by Northbrook despite the bankruptcy court's order. R. 1423. In their supporting memorandum, the

⁵ Although it is true that the Edwards' counsel, on behalf of other clients with bonded judgments that were still pending on appeal, filed pleadings in the bankruptcy court challenging the stay order, the implication by Celotex and the flat assertion by Northbrook that counsel had appeared on behalf of the Edwards in the bankruptcy court prior to filing their Rule 65.1 motion (*see* Celotex Br. at 8-11 and Northbrook Br. at 6 n.2 and 18) is misleading and unsupported. The Edwards have filed no claim against Celotex in the bankruptcy, and have consistently maintained that the bankruptcy court lacks subject matter jurisdiction to enjoin enforcement of, and to affect their interest in, the supersedeas bond approved by the federal court in Texas. *See* Joint Status Report filed February 3, 1992 (J.A. 59-60). The Edwards did answer an adversary proceeding to invalidate the bonds, filed by Celotex almost two years after the bankruptcy court's initial stay order, subject to an objection to the bankruptcy court's subject matter jurisdiction. N.A. 152-53.

⁶ The order was later reversed by the Fourth Circuit. *Willis v. Celotex Corp.*, 978 F.2d 146 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1846 (1993).

Edwards candidly advised the district court of the bankruptcy court's October 17, 1990 stay order, R. 1447, 1450-52, but contended that the bankruptcy court was "simply without jurisdiction" to stay enforcement of an obligation in which Celotex had no property interest. R. 1447. Both Celotex and Northbrook opposed the motion, arguing both that the proceeding against Northbrook was stayed under 11 U.S.C. § 362 and that the Edwards had been effectively enjoined from attempting to enforce the bond by the bankruptcy court's October 17, 1990 order. R. 1524-47 (Celotex opposition); J.A. 28-33 (Northbrook opposition).

On June 13, 1991, nearly six weeks *after* the Edwards filed their motion in Texas, the bankruptcy court issued an "omnibus order" clarifying the intended scope of its October 17, 1990 stay order. *In re Celotex*, 128 B.R. 478 (Bankr. M.D. Fla. 1991), P.A. 30. In its omnibus order, the bankruptcy court asserted for the first time that its October 17, 1990 order extending the § 362 automatic stay was additionally intended to enjoin persons who, like the Edwards, had final, enforceable judgments against Celotex at the time of the bankruptcy from pursuing remedies against the third parties that had issued supersedeas bonds securing the judgments. 128 B.R. at 484-85, P.A. 46. The bankruptcy court acknowledged that Celotex had no property interest in such bonds; upon the successful completion of the appeals by the judgment creditors, the court noted, Celotex's "reversionary" interest in the supersedeas bond had been "divested." 128 B.R. at 481, 482, P.A. 36, 39-40. Accordingly, the court observed, the § 362 stay of proceedings "against the debtor or against the debtor's estate" did not preclude enforcement of supersedeas bonds securing judgments that were final at

the time of the bankruptcy. *Id.* The bankruptcy court nevertheless purported to find authority to enjoin enforcement of supersedeas bonds in which Celotex has no property interest in § 105 of the Bankruptcy Code. The court theorized that enforcement of supersedeas bonds against third parties might in some way impede Celotex's ability to formulate a plan of reorganization, and suggested that in "mega" bankruptcy cases involving "multi-million dollars in claims and assets," the powers of the bankruptcy court under § 105 "*must in the initial stage be absolute, unless limited by the Bankruptcy Code or other federal laws.*" 128 B.R. at 484, P.A. 44 (emphasis added). Finally, the bankruptcy court hypothesized that some or all of the bonds could be set aside as preferential or fraudulent transfers, and that claims on judgments awarding punitive damages could be subordinated or disallowed. 128 B.R. at 484, P.A. 45. The court made this observation even though, eight months after filing the bankruptcy and obtaining the stay order, Celotex had not even *commenced* any proceeding to invalidate or avoid the supersedeas bonds.

In light of the bankruptcy court's recognition that Celotex did not have a property interest in the supersedeas bond that secured the Edwards' judgment, and with the belief that the bankruptcy court therefore lacked jurisdiction to enjoin proceedings against third parties involving the bond, the Edwards pressed their motion against Northbrook under Rule 65.1 in the district court in Texas. Celotex filed a supplemental response to the Edwards' Rule 65.1 motion in the Texas court, alerting the court to the bankruptcy court's omnibus order. J.A. 53-56. In a joint status report requested by the Texas court, Celotex and Northbrook reiterated their objections to the

proceeding based on the bankruptcy court's stay orders and the automatic bankruptcy stay. J.A. 57-63. Fully apprised of the bankruptcy court's stay orders and of the jurisdictional objections of Celotex and Northbrook, the district court nonetheless granted the Edwards' motion to enforce Northbrook's obligation under the supersedeas bond on May 27, 1991. P.A. 23. Celotex timely appealed. J.A. 64-65.

The Fifth Circuit affirmed, holding the § 362(a) automatic stay inapplicable and the bankruptcy court's extraordinary § 105 stay order ineffective to prevent the Edwards from recovering against Northbrook. *Edwards v. Armstrong World Indus., Inc.*, 6 F.3d 312 (5th Cir. 1993), P.A. 1. The Fifth Circuit first rejected Celotex's contention that the Edwards' motion against Northbrook was a proceeding "against the debtor or against property of the estate" stayed under § 362(a). Citing the bankruptcy court's own omnibus order, the Fifth Circuit held that because "the appellate process had been completed and Celotex no longer had an interest, reversionary or otherwise, in this particular supersedeas bond, the automatic stay provisions will not prevent Northbrook from fulfilling its obligation."⁷ 6 F.3d at 317, P.A. 13.

The Fifth Circuit then addressed the "more difficult issue" of whether the district court should have denied the Edwards' motion in deference to the bankruptcy court's § 105 stay order. 6 F.3d at 317, P.A. 13. The court observed that 28 U.S.C. § 1334(b) extends the subject matter jurisdiction of the bankruptcy courts to matters

⁷ On this issue, the Fifth Circuit's decision is consistent with that of the Fourth Circuit in *Willis v. Celotex Corp.*, 978 F.2d 146, 148-49 (4th Cir. 1992), cert. denied, 113 S. Ct. 1846 (1993).

"related to a case under title 11," and noted Celotex's threshold contention that "under this jurisdictional grant, the equitable powers of the bankruptcy court are sufficient to stay a proceeding to release the supersedeas bond." 6 F.3d at 318, P.A. 14. It then "sharpened" the issue to consider "whether prudential (or other) considerations justify extending the bankruptcy court's jurisdiction to the point where it includes the power to stay the proceedings in question here."⁸ *Id.*

The Fifth Circuit explained that a bankruptcy court's jurisdiction does not extend to proceedings involving property in which, as in this case, the debtor has no

⁸ Northbrook's suggestion that the Fifth Circuit did not question the bankruptcy court's subject matter jurisdiction to issue a stay order binding the Edwards and Northbrook, Northbrook Br. at 12, is therefore incorrect. The Fifth Circuit's decision was premised on the fact that the bankruptcy court lacked jurisdiction to enjoin the Edwards from proceeding against Northbrook. Although both Northbrook and Celotex attempt to make much of the Fifth Circuit's reference to the bankruptcy court's lack of "authority" and "power" to enjoin the Edwards' proceeding, rather than of the bankruptcy court's lack of "jurisdiction," the choice of terminology is inconsequential, and in fact was invited by Celotex. In its petition for rehearing addressed to the Fifth Circuit panel, Celotex itself confessed that in its "zeal to have the Northern District's order reversed, Celotex did not emphasize its argument regarding jurisdiction and venue and instead argued, in essence, that the court should affirm the Tampa bankruptcy court's temporary stay order." Celotex Petition for Rehearing filed November 19, 1993, at 2 n.3. The Fifth Circuit cannot be faulted for discussing at length the merits of the bankruptcy court's § 105 order when Celotex itself invited the court to do so.

interest. The court acknowledged that § 105 of the Bankruptcy Code authorizes bankruptcy courts to enjoin proceedings against non-bankrupt entities that threaten the integrity of the bankrupt's estate. 6 F.3d at 320, P.A. 18-19. It pointed out, though, that "the integrity of the estate is not implicated in the present case because [Celotex] has no present or future interest in this supersedeas bond." *Id.* The allegation that the bond was collateralized with Celotex's property, the court reasoned, did not affect this conclusion; whether Celotex could assume the surety agreement or avoid it and thus seek return of the collateral was an issue solely between Celotex and Northbrook. 6 F.3d at 320 n.7, P.A. 19. Responding to Celotex's argument that the policies informing the Bankruptcy Code favored centralized, uniform treatment of all Celotex judgment holders, the Fifth Circuit observed:

Although the idea of using the bankruptcy court as a clearing house for all of these cases may seem desirable as a policy matter, section 105(a) simply does not give bankruptcy courts authority over assets that are not property of the debtor's estate and in which the debtor has no interest. We cannot globalize the bankruptcy court's authority in that manner.

6 F.3d at 319, P.A. 16-17.

The Fifth Circuit also emphasized that § 105(a) should not be construed to grant to the bankruptcy courts power to "eviscerate the very purpose" of supersedeas bonds. 6 F.3d at 319, P.A. 17. The stay of execution of the April 17, 1989 judgment was granted to Celotex, the court noted, only because it furnished the Edwards with a court-approved promise by a third party to pay the judgment after appeal if Celotex were unable, for any reason,

to do so. *Id.* It would be "manifestly unfair," the court reasoned, "to force the judgment creditor to delay the right to collect with a promise to protect the judgment only to later refuse to allow that successful plaintiff to execute the bond because the debtor has sought protection under the laws of bankruptcy." 6 F.3d at 319, P.A. 17-18.

The court acknowledged that in *Willis v. Celotex Corp.*, 978 F.2d 146 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1846 (1993), the Fourth Circuit had found that the Celotex bankruptcy court was authorized under § 105 to issue its global stay on execution of supersedeas bonds. It expressly disagreed with the Fourth Circuit's reasoning and conclusion, holding that "[w]hatever the ultimate scope of § 105, it does not extend so far as to give the bankruptcy court authority over a supersedeas bond in which the debtor has no interest." 6 F.3d at 320, P.A. 19. Rejecting Celotex's contention that § 105 "gives bankruptcy courts virtually limitless ability to bring parties to heel to its authority," 6 F.3d at 318, P.A. 13, and citing a previous refusal to "bow in complete obeisance to a bankruptcy court stay,"⁹ 6 F.3d at 320, P.A. 20, the Fifth Circuit concluded that the district court had acted properly in allowing the Edwards to execute on the supersedeas bond against Northbrook.

To be sure, the bankruptcy court does not share the Fifth Circuit's concern that supersedeas bonds posted to

⁹ The court cited *Kellogg v. Blue Quail Energy, Inc. (In re Compton Corp.)*, 831 F.2d 586 (5th Cir. 1987), *modified on other grounds*, 835 F.2d 584 (5th Cir. 1988), in which it had held that a bankruptcy court could not enjoin a payment of funds from the obligor on a letter of credit to the beneficiary.

stay execution pending appeal serve their intended purpose. Unlike the Edwards, several persons with final bonded judgments against Celotex elected to acquiesce to the jurisdiction of the bankruptcy court and to seek relief from the stay orders directly from that court. On May 29, 1992, more than nineteen months after Celotex filed for bankruptcy protection and two days after the district court granted the Edwards' motion to allow execution on the supersedeas bond, the bankruptcy court issued an order denying the motions for relief from the § 105 stay. *In re Celotex*, 140 B.R. 912 (Bankr. M.D. Fla. 1992), P.A. 47. The bankruptcy court noted that the assets pledged by Celotex to secure the supersedeas bonds comprise a significant portion of Celotex's bankruptcy estate,¹⁰ and speculated that if the bonds were voided under some provision of bankruptcy law, the virtually innumerable unsecured creditors of Celotex would benefit.¹¹ 140 B.R.

¹⁰ Celotex alleges that on the date of its bankruptcy, it was jointly liable on about 100 supersedeas bonds, which secured about \$70 million in judgments. P.A. 41, 49. Although this number is large, it must be kept in perspective. Prior to the bankruptcy, Celotex had paid out some \$360 million in settlement of asbestos-related personal injury claims. P.A. 49 n.2. Celotex has not suggested that any of these payments were preferential or fraudulent, and has not attempted to recoup them for the benefit of the estate. The record is silent on the potential size of Celotex's bankruptcy estate.

¹¹ The extent of the benefit is, of course, dependent on the number of unsecured creditors. The bankruptcy court's opinion states that over 141,000 suits against Celotex for asbestos-related personal injury or property damage were pending at the time of Celotex's bankruptcy filing. In the years following the bankruptcy filing, an enormous but unknown number of claims have accrued. Even if all supersedeas bonds were voided and the assets securing the bonds made available to unsecured

at 914-16, P.A. 53-57. The bankruptcy court acknowledged that the enforcement of supersedeas bonds is "a matter of risk distribution" and that allowing judgment holders to enforce their bonds against third party sureties "would merely shift the battleground," requiring the sureties to bear the burden of Celotex's bankruptcy in the place of the judgment holders (as, of course, the bonds were intended to do). 140 B.R. at 915, P.A. 53, 52. Inexplicably, however, the bankruptcy court then suggested that payment to the judgment holders on the supersedeas bonds "may foster an apocalypse" and hinder the development of a successful plan of reorganization. 140 B.R. at 915, P.A. 54. Without explanation, the bankruptcy court also suggested that "dissolution of the § 105 stay could transform this case into another *Jarndyce v. Jarndyce*." 140 B.R. at 916, P.A. at 54-55 (citing CHARLES DICKENS, *BLEAK HOUSE* (1853)).

More than two years have passed since the bankruptcy court issued its order denying relief from the § 105 stay. To date, the bankruptcy court has not given leave for any judgment creditor to collect on a supersedeas bond, making the court's reference to *BLEAK HOUSE* in its May, 1992 order a sad irony.¹² The adversary proceeding to void all supersedeas bonds issued by Celotex, brought by

creditors, the benefit to each creditor would be negligible. The professed concern of Celotex and the bankruptcy court for the unsecured creditors of Celotex is unconvincing and pretextual.

¹² One frustrated judgment creditor has filed a complaint with the United States Court of Appeals for the Eleventh Circuit, alleging that the bankruptcy judge is guilty of judicial misconduct in failing to schedule proceedings which would determine the creditor's right to immediate enforcement of the bond against the surety. 9 MEALEY'S LITIGATION REPORTS, ASBESTOS, No. 12, at 7, E-1 (July 15, 1994).

Celotex almost two years after its bankruptcy filing and to which the Edwards are a party, is unresolved with no trial date scheduled or imminent. Before this Court issues its judgment in this case, the Celotex bankruptcy will have been pending for more than four years, with no end in sight. And the promise by Northbrook to pay the Edwards' judgment when final if Celotex could not do so, made pursuant to Federal Rule 62(d) in 1989, remains unfulfilled.

SUMMARY OF ARGUMENT

The Fifth Circuit properly held that the Celotex bankruptcy court's attempt to stay execution of supersedeas bonds under § 105 of the Bankruptcy Code did not preclude the district court from granting the relief sought by the Edwards against Northbrook under Rule 65.1. As Celotex itself concedes, a judgment or order issued by a court that does not have jurisdiction is void and is not binding on other courts. Unless the bankruptcy court had jurisdiction under 28 U.S.C. § 1334(b) to affect the rights of the Edwards, who are not parties to the Celotex bankruptcy, against Northbrook, the Fifth Circuit was under no obligation to honor the stay order as it applied to the Edwards.

In *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32, 112 S. Ct. 459 (1991), this Court recognized that the broad jurisdiction granted by Congress to the bankruptcy courts under § 1334(b) is limited by other, more specific provisions of federal law. Similarly, in *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1765 (1994), this Court noted that absent a clear showing

that Congress intended to disturb state law and traditions, "the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law."

Celotex and Northbrook do not and cannot show that in enacting § 1334(b), Congress intended to vitiate the benefits granted to judgment creditors and judgment debtors by Rules 62(d) and 65.1 of the Federal Rules of Civil Procedure and corresponding state law governing the suspension and securing of money judgments. For more than two hundred years, federal law has permitted a party liable on a judgment to obtain a stay of execution pending appeal, but only if the judgment debtor posts a supersedeas bond or other security that would assure the judgment creditor full satisfaction upon completion of the appeal. The decisions of this Court recognize that the obligations of a surety on a supersedeas bond are more than merely contractual; they are grounded in law and tradition. Yet if bankruptcy courts were permitted to exercise jurisdiction over proceedings involving supersedeas bonds, the protections that bonds provide to judgment creditors would be eviscerated. Such an expansive interpretation of § 1334(b) would harm defendants as well as plaintiffs in civil cases, and would wreak havoc in the state and federal judicial systems. Courts would be more reluctant, or perhaps entirely unwilling, to approve supersedeas bonds, making it more difficult for defendants to obtain stays of execution; the courts would be compelled to supervise detailed post-judgment discovery concerning the nature of the relationship between the judgment debtor and the surety; and litigants would lose faith in the ability of the courts to protect and enforce their judgments. Congress could not have intended such

consequences in enacting § 1334(b). Absent a clear showing of such intent, the statute should not be interpreted to disturb ancient federal and state practices governing the suspension and bonding of judgments.

Celotex's commencement of an adversary proceeding within the bankruptcy case to invalidate all of the supersedeas bonds that it posted before its bankruptcy, including the Edwards' bond, did not give the bankruptcy court after-the-fact jurisdiction to enjoin the Edwards' motion against Northbrook. The bankruptcy court issued its stay order almost two years *before* Celotex commenced its adversary proceeding, and the order does not even purport to comply with the requirements for an injunction connected with an adversary proceeding specified by FED. R. BANKR. P. 65 and FED. R. CIV. P. 65. Moreover, the theories upon which Celotex seeks to set aside the Edwards' bond are frivolous. Celotex's contention that the bankruptcy court could affect Northbrook's liability to the Edwards on the bond under the theories of disallowance or equitable subordination is undermined by the plain language of 11 U.S.C. § 524(e), which provides that discharge of a claim against a debtor will not affect the liability of any other entity on that claim. Celotex's alternative allegation that its posting of the bond was "constructively fraudulent" because Celotex received "no value" for the bond defies common sense and flies in the face of precedent of this and other Courts recognizing the benefits that a judgment debtor enjoys by posting a supersedeas bond. Celotex's adversary proceeding thus does not support the exercise of jurisdiction by the bankruptcy court to impair the execution of the supersedeas bond against Northbrook in this case.

Finally, notions of comity did not require the Fifth Circuit to deny the Edwards relief in deference to the bankruptcy court's stay order. Although Celotex and Northbrook correctly state the general rule that courts should ordinarily give effect to injunctive orders issued by other courts, the general rule does not apply if the court that issued the order lacked jurisdiction to do so. Northbrook's characterization of the Fifth Circuit's refusal to honor the bankruptcy stay as "unseemly" is misplaced. It is the bankruptcy court's attempt to interfere with the ability of other federal courts to enforce their judgments, when such enforcement would not affect the bankruptcy estate, that violates notions of comity. The Fifth Circuit's refusal to defer to the bankruptcy court's attempt to exercise "absolute" power over parties not before it was appropriate under the circumstances of this case. The Fifth Circuit's judgment should be affirmed.

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY UPHELD THE DISTRICT COURT'S ORDER ALLOWING EXECUTION ON THE SUPERSEDEAS BOND AGAINST NORTHBROOK NOTWITHSTANDING THE BANKRUPTCY COURT'S ORDER PURPORTING TO STAY EXECUTION ON SUPERSEDEAS BONDS GENERALLY, BECAUSE THE BANKRUPTCY COURT DID NOT HAVE JURISDICTION TO ISSUE THE ORDER.

A. If the Bankruptcy Court Lacked Jurisdiction To Issue the Stay Order, Then the Fifth Circuit Correctly Declined To Honor It.

Both Celotex and Northbrook concede that the Fifth Circuit properly allowed the Edwards to execute against

Northbrook on the supersedeas bond notwithstanding the bankruptcy court's stay order if the bankruptcy court was without jurisdiction to issue the order.¹³ Celotex Br. at 26; Northbrook Br. at 15-17. This concession is well-advised, as it is supported by precedent of this Court and others. See *Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940) (because filing of bankruptcy petition by farmer ousted state court of subject matter jurisdiction over foreclosure proceeding, subsequent action of state court "was not merely erroneous but was beyond its power, void, and subject to collateral attack"); *Vallely v. Northern F. & M. Ins. Co.*, 254 U.S. 348, 353-54 (1920) (if courts act beyond authority delegated to them, "their judgments and orders are nullities. They are not voidable, but simply void, and this even prior to reversal"); *In re Sawyer*, 124 U.S. 200

¹³ Despite its concession, Celotex suggestively cites this Court's opinions in *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940) and *Stoll v. Gottlieb*, 305 U.S. 165 (1938), hinting that even if the bankruptcy court lacked jurisdiction to stay execution of the supersedeas bond against Northbrook, then the stay must be given preclusive effect. Celotex Br. at 24, 30 n. 8. The cases are, however, distinguishable. Each involved a collateral attack on a bankruptcy order by a party that had previously appeared and asserted a claim in the bankruptcy and had had an opportunity to challenge the bankruptcy court's jurisdiction in the bankruptcy proceeding itself. *Chicot County Drainage Dist.*, 308 U.S. at 375 (noting that creditors "were parties" and "had full opportunity to present any objections to the proceeding"); *Stoll*, 305 U.S. at 177 ("we base our conclusion here on the fact that in an actual controversy the question of the jurisdiction over the subject matter was raised and determined adversely to the respondent"). In contrast, the Edwards have not filed a claim against Celotex in the bankruptcy case. As Celotex ultimately appears to recognize, the Edwards therefore had no opportunity, and no obligation, to challenge the bankruptcy court's jurisdiction in that proceeding.

(1888) (holding contempt citation for violating injunction "null and void" because court issuing injunction had no jurisdiction to do so); *Querner v. Querner (In re Querner)*, 7 F.3d 1199, 1201 (5th Cir. 1993) ("Where a federal court lacks jurisdiction, its decisions, opinions, and orders are void").

Celotex and Northbrook are thus forced to attack the Fifth Circuit's conclusion that the bankruptcy court did not have jurisdiction to stay "all entities" from enforcing supersedeas bonds against third parties to the bankruptcy. But, as demonstrated below, the legislative history of the statutory grant of jurisdiction to the bankruptcy courts, the precedent interpreting the grant, and the policies underlying both supersedeas bonds and bankruptcy all support the Fifth Circuit's conclusion.

B. The Bankruptcy Court Lacked Jurisdiction To Restrain the Edwards from Executing Against Northbrook on the Supersedeas Bond.

It is axiomatic that "[b]ankruptcy courts are courts of limited jurisdiction, whose scope is statutorily defined." *Querner*, 7 F.3d at 1201. The "limited authority Congress has vested in bankruptcy courts," *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32, —, 112 S. Ct. 459, 464 (1991), is confined to jurisdiction over the debtor's property and property of the bankruptcy estate, 28 U.S.C. § 1334(d), and civil proceedings "arising in or related to title 11," 28 U.S.C. § 1334(b).

Celotex and Northbrook do not seriously contend that the bankruptcy court had exclusive jurisdiction over the Edwards' action to execute against Northbrook on the supersedeas bond. As the Fifth Circuit pointed out and

even the bankruptcy court acknowledged, Celotex's contingent interest in the supersedeas bond¹⁴ had been extinguished prior to the bankruptcy by the affirmance of the Edwards' judgment against Celotex. The bankruptcy court had subject matter jurisdiction to issue orders affecting the bond, then, only if the proceedings on the bond were "related" to the Celotex bankruptcy itself within the meaning of § 1334(b).

1. The Jurisdictional Grant in § 1334(b) Is Limited and Must Be Harmonized with Other Federal Law.

Reading the briefs of Celotex and Northbrook, one would think that there are simply no practical limits to the exercise of bankruptcy jurisdiction under § 1334(b), so long as the bankruptcy court invokes § 105 in aid of its jurisdiction.¹⁵ Celotex contends that because the bankruptcy court

¹⁴ More precisely, Celotex had a contingent interest in the collateral securing its reimbursement obligation to Northbrook in the event that Northbrook paid on the bond.

¹⁵ Section 105(a) itself is not a jurisdictional grant; as 11 U.S.C. § 105(c) makes clear, in order for a bankruptcy court to issue an order under § 105(a), it must have jurisdiction under some provision of title 28. *In re Wolverine Radio Co.*, 930 F.2d 1132, 1140 n.13 (6th Cir. 1991), *cert. dismissed*, 112 S. Ct. 1605 (1992). And as this Court has recognized, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). Accordingly, the lower courts have noted that § 105 does not give the bankruptcy court "power to create substantive rights under the Code," *In re Morristown & Erie R.R.*, 885 F.2d 98, 100 (3d Cir. 1989), or "free-floating discretion to redistribute rights in accordance with [its] personal views of fairness, however enlightened those views

had subject matter jurisdiction over the Celotex bankruptcy itself (a self-evident proposition that neither the Edwards nor the Fifth Circuit disputed), the bankruptcy court also had both jurisdiction under § 1334(b), and power under § 105, to issue any order purportedly related to the bankruptcy. Celotex Br. at 27. Northbrook similarly submits that because the Edwards' motion to enforce the bond could "conceivably," albeit indirectly, affect Celotex's bankruptcy estate, the bankruptcy court's stay order was an authorized exercise of its jurisdiction under § 1334(b). Northbrook Br. at 18 n.8.

Both Celotex and Northbrook interpret § 1334(b)'s grant to bankruptcy courts of jurisdiction over proceedings "related to" bankruptcy cases far too broadly. It is true, as Celotex and Northbrook emphasize, that in enacting § 1334(b) and its predecessor,¹⁶ Congress intended to expand the jurisdiction of the bankruptcy courts. But the expansion was from an extremely narrow base; the jurisdiction of bankruptcy courts under prior law was quite

might be," *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 791 F.2d 524, 528 (7th Cir. 1986).

¹⁶ Congress enacted 28 U.S.C. § 1471(b), as part of the Bankruptcy Reform Act of 1978. That statute authorized federal district courts to exercise jurisdiction over civil proceedings "related to cases under title 11." Section 1471(c) in turn vested that jurisdiction in Article I bankruptcy courts. After the Supreme Court found the complete delegation of bankruptcy jurisdiction to Article I courts to be unconstitutional in *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), Congress repealed § 1471 in its entirety and in its place enacted § 1334 as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 333. The grants of jurisdiction to district courts under § 1471(b) and § 1334(b) are identical. *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 787 (11th Cir. 1990); *In re Wood*, 825 F.2d 90, 92-93 (5th Cir. 1987).

limited. The old Bankruptcy Act of 1898 authorized the bankruptcy courts to exercise in rem jurisdiction only over "property over which the debtor had actual or constructive possession." *Katchen v. Landy*, 382 U.S. 323, 327 (1966). Bankruptcy courts could exercise jurisdiction over property in which the debtor had solely an equitable interest only with the consent of the parties. *Id.* at 328. By extending bankruptcy jurisdiction to matters "related to" bankruptcy cases, Congress intended to eliminate the "idea of possession and consent as bases for jurisdiction," and to provide bankruptcy courts with "in personam as well as in rem jurisdiction in order that they may handle everything that arises in a bankruptcy case." S. REP. NO. 989, 95th Cong., 2d Sess. 153 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5939 (emphasis added); accord H.R. REP. NO. 95-595, 95th Cong., 2d Sess. 47-48, reprinted in 1978 U.S.C.C.A.N. 5787, 6009 (noting Congress' intent to "confer jurisdiction over all litigation having a significant connection with bankruptcy") (emphasis added).

But nothing in the language or legislative histories of § 1334(b) and its predecessor, or in the cases interpreting the jurisdictional grant, indicates that Congress intended to endow bankruptcy courts with jurisdiction to issue orders that have no significant connection with bankruptcy or cannot affect the bankrupt party's estate. On the contrary, the courts have recognized that "Congress must have intended to put some limit on the scope of 'related to' jurisdiction." *Turner v. Ermiger (In re Turner)*, 724 F.2d 338, 341 (2d Cir. 1983) (emphasis added); accord *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 161 (7th Cir. 1994) (although "[t]aken at its full breadth," § 1334(b) would allow the exercise of bankruptcy jurisdiction over a products liability claim against the purchaser of assets

in a bankruptcy sale, "the language should not be read so broadly"); *In re Xonics*, 813 F.2d 127, 131 (7th Cir. 1987) ("The bankruptcy jurisdiction [under § 1334(b)] is designed to provide a single forum for dealing with all claims to the bankrupt's assets. It extends no farther than its purpose").

Accordingly, this Court has recognized that the broad language of § 1334(b) does not provide bankruptcy courts with unbridled jurisdiction to enjoin proceedings in other forums that may affect the debtor. In *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32, 112 S. Ct. 459 (1991), the Court considered whether the jurisdictional grant in 28 U.S.C. § 1334(b) permitted a district court sitting in bankruptcy to enjoin two prepetition administrative proceedings brought by the Federal Reserve System against the debtor for violation of banking regulations. The Court held that the district court "lacked jurisdiction to enjoin either regulatory proceeding." 112 S. Ct. at 461. The Court first noted that administrative proceedings to enforce a governmental unit's police or regulatory power are expressly exempted from the automatic stay provisions of the Bankruptcy Code by 11 U.S.C. § 362(b)(4). *Id.* at 463-64. The Court rejected MCorp's contention that the administrative proceedings were acts to obtain or exercise control over property automatically stayed under §§ 362(a)(3) and 362(a)(6) of the Bankruptcy Code, noting that although the proceedings may ultimately affect the bankruptcy court's control over the property of the estate, "that possibility cannot be sufficient to justify the operation of the stay against an enforcement proceeding that it expressly exempted by subdivision (b)(4)." *Id.* at 464 (emphasis in original).

The Court then rejected MCorp's contention that the bankruptcy court could exercise concurrent jurisdiction over the administrative proceedings under § 1334(b), reasoning that maintenance of the proceedings "seem[ed] unlikely to impair the Bankruptcy Court's exclusive jurisdiction over the property of the estate protected by 28 U.S.C. § 1334(d)." *Id.* at 465. The Court acknowledged that if and when the Board sought to enforce an administrative order against the bankruptcy estate itself, "then it may well be proper for the Bankruptcy Court to exercise its concurrent jurisdiction under 28 U.S.C. § 1334(b)." *Id.* at 464. But because the proceedings themselves would not directly affect the bankruptcy estate, the Court explained, 28 U.S.C. § 1334(b) did not vest the district court with jurisdiction to enjoin them. *Id.* at 465.

Moreover, the Court held, § 1334(b) should not be interpreted to conflict with or supersede another more specific provision of federal law. The Financial Institutions Supervisory Act of 1966, the Court noted, included the provision that "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any [Board] notice or order." *Id.* at 463 (quoting 12 U.S.C. § 1818(i)(1)). The plain language of § 1334(b), which purports to apply "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts," and which was enacted as law *after* the passage of 12 U.S.C. § 1818(i)(1), would appear to support that provision. Nonetheless, the Court concluded that "the specific preclusive language in 12 U.S.C. § 1818(i)(1) is not qualified or superseded by the general provisions governing bankruptcy proceedings on which MCorp relies." *Id.* at 465.

As in *MCorp*, the proceedings in this case purportedly enjoined by the bankruptcy court did not directly affect the bankruptcy estate. As the bankruptcy court and the Fifth Circuit agreed, Celotex no longer had any cognizable right to or interest in the supersedeas bond at the time of the bankruptcy. Thus, as in *MCorp*, the motion to execute against Northbrook would not "impair the bankruptcy court's exclusive jurisdiction over the property of the estate protected under § 1334(d)."

More importantly, as in *MCorp*, the scope of bankruptcy jurisdiction under § 1334(b) should be interpreted with reference to other federal law.¹⁷ In *MCorp*, the Court recognized that although § 1334(b)'s grant of bankruptcy jurisdiction is virtually limitless in its terms,¹⁸ it should not be read to conflict with or supersede the preclusive language of 12 U.S.C. § 1818(i)(1). Similarly, the Edwards contend, § 1334(b) should not be read to conflict with Federal Rules 62(d) and 65.1 and with the historical understanding and traditional function of supersedeas bonds.

¹⁷ Cf. *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1765 (1994), discussed in this Brief *infra* at 46-47, in which this Court noted that the substantive provisions of the Bankruptcy Code "will be construed to adopt, rather than to displace, state law," absent a clear showing of contrary legislative intent.

¹⁸ One commentator has observed that under the terms of the statute, "[c]onceptually, there is no limit to the reach of this jurisdiction." 1 COLLIER ON BANKRUPTCY ¶ 3.01[1][e] (15th ed. 1983).

2. In View of the History and Purpose of Supersedeas Bonds, Congress Could Not Have Intended To Authorize the Exercise of Bankruptcy Jurisdiction over Claims on Supersedeas Bonds Made Solely Against Non-Debtors.

As this Court recognized more than a century ago, the practice of requiring a judgment debtor to post a bond in order to obtain a stay of execution pending appeal arose from statutes enacted in England in the seventeenth century. *Omaha Hotel Co. v. Kountze*, 107 U.S. 378, 381-84 (1883).¹⁹ Prior to the enactment of these statutes, English common law did not require the posting of a bond to stay execution of a judgment; the writ of error itself served to supersede the judgment by directing that a writ of execution not be issued. *Id.* at 381. Recognizing the increasing tendency for judgment debtors to seek writs of error solely for purposes of delay, Parliament enacted statutes requiring the posting of "bail" to stay execution of a judgment pending appeal. ROSCOE POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 49 (1941). A statute of James I, enacted in 1606, provided that no execution should be stayed on any writ of error

unless the person or persons in whose name or names such writ of error shall be brought, with two sufficient sureties, such as the court wherein the judgment is given shall allow of, shall first be bound unto the party for whom the judgment is given, by recognizance to be acknowledged in the same court, in double the

¹⁹ See ROSCOE POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 47-51 (1941) for an exhaustive description of bonding practice in England prior to the American Revolution.

sum adjudged to be recovered by the former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay, if the said judgment be affirmed, or the writ of error nonprossed, all and singular the debts, damages and costs adjudged upon the former judgment, and all costs and damages to be awarded for the delaying of execution.

3 James I, c.8 (1606). Two statutes of Charles II extended this measure to apply to all judgments after verdict on personal actions. POUND, *supra*, at 50 n.1 (citing 16 & 17 Charles II, c.8 (1665) and 22 & 23 Charles II, c.4 (1671)). Much of the ceremonious language in today's supersedeas bonds, such as the requirement that the appeals be prosecuted "with effect," is derived from these English statutes.

In this country, the obligations of a surety on a supersedeas bond were originally governed by statute. Section 22 of the Judiciary Act of 1789, 1 Stat. 73, 85, required courts staying execution of a judgment to take "good and sufficient security" that the plaintiff in error "shall prosecute his writ to effect, and answer all damages and costs, if he fails to make his plea good." This statute was interpreted to have "the same effect as the recognizance required by the English statutes, and was intended to secure payment of the original judgment, as well as damages for delay." *Kountze*, 107 U.S. at 386-87 (citing *Catlett v. Brodie*, 22 U.S. (9 Wheat.) 553 (1824)). This provision was later recodified as § 1000 of the Revised Statutes, retaining its purpose "to indemnify the party prevailing in the original suit against loss in the respects stated in the bond, by reason of an ineffectual attempt to reverse

the holding of the trial court." *Crane v. Buckley*, 203 U.S. 441, 446 (1906).

Because the posting of supersedeas bonds had been authorized and governed by statute, this Court recognized that such bonds were more than simple contracts between the judgment creditor, the judgment debtor, and its surety. For example, in *Kountze*, the Court held that rentals lost during the pendency of an appeal of a judgment in a foreclosure case were not recoverable under the supersedeas bond posted in the case, even though the language of the bond authorized such a recovery. The Court reasoned that

[a]s an appeal bond, or bond in error, is a formal instrument required by the law and governed by the law, and has, by nearly a century's use, become a formula in legal proceedings, with a fixed and definite meaning, and as the important right of appeal is greatly affected by it, we think that it is not allowable, in practice, by a change in its phraseology, to give to it an effect contrary to what the statute intended. It would be against the policy of the law to allow such deviations and irregularities to creep in.

107 U.S. at 395. Similarly, in *American Surety Co. of New York v. Schultz*, 237 U.S. 159 (1915), the Court ruled that an action by a judgment creditor (Schultz) against the surety on a supersedeas bond securing a federal judgment was an action arising under federal law, over which a federal district court could exercise subject matter jurisdiction even in the absence of diversity of citizenship. Distinguishing the action to enforce the supersedeas bond from "an ordinary action on a sealed instrument voluntarily given," *id.* at 159, the Court observed that

while in a sense the supersedeas bond was the contract of the Surety Company, it was not made in pursuance of any agreement with Schultz, and could have been given over his objection, since the laws of the United States . . . declared that a writ of error could be obtained by the defendant filing an approved bond with surety, conditioned to make good his appeal. Such a bond operated to stay the judgment. Conversely, when that judgment was affirmed, the same laws of the United States gave Schultz a right of action on the bond, and in the suit to enforce that right the measure of the recovery depended upon the construction to be given the Federal statute.

Id.

In 1938, Congress replaced the relevant statutory provisions governing supersedeas bonds with Rules 62(d), 73(d) and 73(f) of the Federal Rules of Civil Procedure. Rule 73(f) had no statutory antecedent. It was intended to "provide[] a remedy in addition to any other remedies against sureties." FED. R. CIV. P. 73(f) advisory committee's note. In 1966, Congress incorporated the provisions of Rule 73(f) into new Rule 65.1 in order to provide a "single comprehensive rule" permitting "summary proceedings against sureties on bonds required or permitted by the rules." FED. R. CIV. P. 65(c) advisory committee's note to 1966 amendment. The remainder of Rule 73 was abrogated in 1968 with the adoption of the Federal Rules of Appellate Procedure. Although the specific provisions of Rule 73(d) concerning the form and amount of the bond were not incorporated in any other rule, courts have continued to look to the rule as a "useful guide on these matters." 11 CHARLES A. WRIGHT & ARTHUR R. MILLER,

FEDERAL PRACTICE AND PROCEDURE § 2905, at 327 (1973). Additionally, courts have recognized that they have "inherent power" to control the form and amount of security posted to stay enforcement of a judgment. *Id.* at 328; see also *C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F. Supp. 501, 520 (E.D. Pa. 1973); *Trans World Airlines, Inc. v. Hughes*, 314 F. Supp. 94, 96 (S.D.N.Y. 1970), *aff'd*, 515 F.2d 173 (2d Cir. 1975).

Although the posting of supersedeas bonds is now governed by rule rather than by statute, the posting of a supersedeas bond in federal court continues to vest federally-recognized rights in both judgment debtors and judgment creditors. See, e.g., *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 87 S. Ct. 1 (Harlan, Circuit Justice 1966) ("a party taking an appeal from the District Court is entitled to a stay of a money judgment as a matter of right if he posts a bond in accordance with" the applicable federal rules) (emphasis added); *Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n*, 636 F.2d 755, 759 (D.C. Cir. 1980) (holding that the Federal Rules of Civil Procedure entitle a judgment creditor to "a full supersedeas bond . . . in normal circumstances" because "the purpose of the supersedeas bond is to secure the appellee from loss resulting from the stay of execution"). Rules 62(d) and 65.1, like their statutory antecedents, balance the interest of judgment debtors in delaying execution pending appeal against the interest of judgment creditors in insuring that the judgment will be just as collectible when it is finally affirmed as it was when it was entered. Rule 62(d) allows judgment debtors to obtain a stay of execution as a matter of right, but only if they protect judgment creditors from harm resulting from delay by causing a surety

to become independently liable on the judgment. Rule 65.1 affords further protection for judgment creditors by providing that the liability of the surety may be determined summarily and enforced quickly.

The state courts, like the federal courts, permit the posting of a supersedeas bond to suspend enforcement of a judgment as a fundamental protection for both judgment creditors and judgment debtors. 4 AM. JUR. 2D *Appeal and Error* § 369 (1962); 4 C.J.S. *Appeal and Error* § 409 (1993). Although the procedures for posting and enforcing the bonds vary from state to state,²⁰ the dual purpose of the bonds remains the same: to protect the judgment debtor against the risk of immediate but erroneous enforcement of the judgment, while protecting the judgment creditor from changed circumstances during appeal that would vitiate the creditor's ability to collect on the judgment.

In recognition of the purpose of supersedeas bonds, the courts, with the sole exception of the Celotex bankruptcy court, have universally concluded that obligations of third parties under supersedeas bonds posted by a judgment debtor before filing for bankruptcy protection are not property of the bankruptcy estate and should not

²⁰ Texas, for example, provides an even more streamlined mechanism for enforcing supersedeas bonds than does FED. R. CIV. P. 65.1. In recognition of the independent liability that the surety assumes by executing a supersedeas bond, the surety on a supersedeas bond filed in a Texas court becomes a named party to the appellate judgment that affirms the trial court's award. TEX. R. APP. P. 82. Upon completion of the appeal, the judgment creditor need not even file a motion to enforce the judgment against the surety, but need only execute the appellate judgment against the surety.

be impaired by the bankruptcy court.²¹ These decisions come both from bankruptcy courts and from state and federal courts of general jurisdiction determining the effect of bankruptcy filings on cases before them, and they interpret both the old Bankruptcy Act and the 1978 Bankruptcy Code with its expanded definition of "property of the estate," 11 U.S.C. § 541. More significantly, two of these decisions cite the Celotex bankruptcy court's June 13, 1991 decision staying enforcement of supersedeas bonds, but expressly reject its reasoning. See *Keene Corp. v. Acstar Ins. Co. (In re Keene Corp.)*, 162 B.R. 935, 946 (BANKR. S.D.N.Y. 1994) (rejecting the Celotex bankruptcy court's analysis, "whatever merit this approach has as a case management technique," reasoning that if rights under a supersedeas bond "cannot be denied, they should not be delayed");²² *Southmark Corp. v. Riddle (In re*

²¹ In chronological order, these decisions are *Saper v. West*, 263 F.2d 422 (2d Cir.), cert. denied, 360 U.S. 916 (1959); *Mid-Jersey Nat'l Bank v. Fidelity-Mortgage Invs.*, 518 F.2d 640 (3d Cir. 1975); *Atlantic Richfield Co. v. Good Hope Refins.*, 604 F.2d 865 (5th Cir. 1979); *Moran v. Johns-Manville Sales Corp.*, 28 B.R. 376 (Bankr. N.D. Ohio 1983); *Grubb v. FDIC*, 833 F.2d 222 (10th Cir. 1987); *Carter Baron Drilling v. Excel Energy Corp.*, 76 B.R. 172 (D. Colo. 1987); *Carter Real Estate & Dev., Inc. v. Builder's Serv. Co.*, 718 S.W.2d 828 (Tex. Ct. App. 1988); *J.M. Beeson Co. v. Sartori*, 553 So. 2d 180 (Fla. Ct. App. 1989); *W.W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So. 2d 1348 (Fla. 1989); *Southmark Corp. v. Riddle (In re Southmark Corp.)*, 138 B.R. 820 (Bankr. N.D. Tex. 1992); and *Keene Corp. v. Acstar Ins. Co. (In re Keene Corp.)*, 162 B.R. 935 (Bankr. S.D.N.Y. 1994).

²² The *Keene* court held in a subsequent contempt proceeding that it had jurisdiction to restrain temporarily the enforcement of escrow agreements created to secure judgments against *Keene* pending its determination of whether *Keene* had a property interest in the escrows. *Keene v. Acstar Ins. Co. (In re Keene*

Southmark), 138 B.R. 820, 827-28 (BANKR. N.D. Tex. 1992) (rejecting the Celotex bankruptcy court's analysis by noting that "[t]he principal risk against which such bonds are intended as a protection is insolvency. To hold that the very contingency against which they guard shall, if it happens, discharge them, seems to us bad law and worse logic").

Northbrook's characterization of Celotex bankruptcy court's interference with enforceable supersedeas bonds as "novel," see Northbrook Br. at 24, then, is an understatement; the Celotex bankruptcy court's order regarding supersedeas bonds is a radical departure from prior law and has been repudiated by every other bankruptcy court that has considered it. But, as Celotex and Northbrook properly insist, the issue before this Court is not whether the bankruptcy court's interference with proceedings is proper or erroneous, but whether the court had the jurisdiction to do so.

In light of the history and purpose of supersedeas bonds, Congress could not have intended to authorize the exercise of bankruptcy jurisdiction under § 1334(b) to interfere with the enforcement of supersedeas bonds posted under the Federal Rules of Civil Procedure or under the law of any state. As the Fifth Circuit recognized below, the state and federal rules allowing stays of

Corp.), 168 B.R. 285 (Bankr. S.D.N.Y. 1994). The *Keene* court did not hold, as Northbrook implies in its Brief at 22, that it had jurisdiction to restrain execution on property *after* it had determined that *Keene* had no interest. In any event, the *Keene* court did not analyze the scope of its jurisdiction under § 1334(b) to enjoin a proceeding not involving the debtor or potentially affecting the debtor's property.

execution as a matter of right upon the posting of supersedeas bonds would be eviscerated if § 1334(b) were interpreted to allow bankruptcy courts to exercise jurisdiction in order to interfere with the enforcement of the bonds. Federal Rules 62(d) and 65.1, and the supersedeas bond that Celotex posted to invoke them, promised the Edwards more than just a different, but equally contingent, source of payment if their judgment were affirmed. These rules and that bond promised the Edwards, in Celotex's words, "a streamlined procedure"²³ for recovering against Northbrook, and guaranteed the Edwards that they would not have to fight to enforce their rights under the bond in a distant forum. In betting parlance, Congress aimed to provide judgment creditors not just a "sure thing" but also a "fast track."²⁴ The promise made to the Edwards in the supersedeas bond and the Federal Rules, and thousands of promises like them made every day in the state and federal courts, would be undercut by a construction of § 1334(b) that allowed a federal bankruptcy court to exercise jurisdiction over a claim to a supersedeas bond by one non-party to a bankruptcy against another.

Celotex's argument that Congress intended, in its general grant of jurisdiction to the bankruptcy courts under § 1334(b), to undermine the protections of Rules 62(d) and 65.1 is not tied to any statutory language, not supported by any legislative history, and not endorsed by any court other than the one presiding over Celotex's

²³ Celotex Br. at 37.

²⁴ Rule 65.1 even specifies the track by providing that the surety on a supersedeas bond "submits to the jurisdiction of the court" in which the bond is posted.

bankruptcy. It is also unsupported by common sense. Acceptance of Celotex's contention that a bankruptcy court has jurisdiction to enjoin the enforcement of obligations under supersedeas bonds posted in other courts would seriously damage the federal and state judicial systems in at least three significant respects:

- Such a decision would make it harder for defendants to obtain stays of execution.

A reversal in this case might delight Celotex, but it would also disappoint defendants and judgment debtors generally. As the Tenth Circuit observed in *Grubb v. FDIC*, 833 F.2d 222 (10th Cir. 1987), if the bankruptcy of the judgment debtor were to impair the judgment creditor's ability to execute on the supersedeas bond, defendants in civil cases would ultimately suffer. Recognizing that a trial court has discretion not to approve a bond offered to obtain a stay under Rule 62(d) if the bond does not provide the judgment creditor with adequate protection, the *Grubb* court predicted that

trial courts would not grant stays of execution to potentially insolvent national banks, because any supersedeas bond posted by such a bank would not serve the purpose for which these bonds are intended. Instead, the banks would be forced to pay trial court judgments immediately, possibly driving them further toward insolvency.

833 F.2d at 227 n.3.

The *Grubb* court's prophesy is already coming to pass in the wake of the Celotex bankruptcy court's rulings. Courts in at least two states, aware of the Celotex

bankruptcy court's decisions on supersedeas bonds, have ruled that the customary supersedeas bond posted by the defendants is inadequate security because of the possibility that the defendant will seek bankruptcy protection and render the bonds worthless. *Owens-Corning Fiberglas Corp. v. Carter*, 630 A.2d 647 (Del. 1993); *Hyland v. Keene Corp. (In re Asbestos Litig.)*, No. 90C-MY-261, 1992 WL 310216 (Del. Super. Ct. Aug. 10, 1992); *Cardenas v. Owens-Corning Fiberglas Corp.*, No. 94-CA-606 (Colo. Ct. App. 1994), *aff'g* No. 93-CV-58-2 (Colo. Dist. Ct., Boulder, Apr. 20, 1994), *described in* 9 MEALEY'S LITIGATION REPORTS, ASBESTOS, No. 8, at 3, A-1 (May 20, 1994). The courts in these cases required the defendant to post a cash deposit with the court in order to obtain a stay. *Id.* Whether that type of security is any more immune from the jurisdiction of a bankruptcy court under Celotex's theory than the Edwards' supersedeas bond is in this case is open to debate, but the impulse of trial courts to protect judgment creditors from the effects of defendants' possible future insolvency is not. If this Court were to interpret § 1334(b) to enable a bankruptcy court to exercise jurisdiction over proceedings involving supersedeas bonds, rulings like those cited above would proliferate, to the prejudice of defendants in all types of civil cases.

- Such a decision would create a new task for the courts – management of post-judgment discovery concerning the obligations supporting a supersedeas bond.

If the Court were to allow bankruptcy courts to exercise jurisdiction over any proceedings involving a supersedeas bond based on the allegation that the bond is collateralized with the judgment debtor's property, trial

courts may simply require defendants in civil cases to post *unsecured* bonds – that is, bonds obtained through payment of a flat, nonrefundable fee to the surety rather than through the granting of a security interest in the debtor's property. As the Edwards have pointed out, Celotex did not volunteer to disclose the arrangement under which it obtained the supersedeas bond from Northbrook. Judgment creditors would have to obtain this type of information through discovery, which the federal and state courts would have to supervise. The effect on the courts would be immediate; judgment creditors in all cases *now on appeal* in the federal and state systems would be well-advised to seek discovery on the nature of the relationship between the judgment debtor and its surety on the supersedeas bond and, if necessary, to move to set aside the bond as inadequate security for the judgment. It is inconceivable that in enacting § 1334(b), Congress contemplated burdening the federal courts with the need to monitor this new type of discovery. Yet if Celotex's theory of unlimited bankruptcy jurisdiction were adopted and the holding below disturbed, such discovery would become an unwelcome, but undoubtedly routine, task for the courts.

- Such a decision would erode the confidence of litigants in the integrity of the judicial process.

As the Fifth Circuit subtly but poignantly noted, this case does not involve merely a promise from one private party to another. Rather, this case involves a series of commitments made to and by the court itself. Celotex, the Fifth Circuit noted, "made a promise to the prevailing plaintiffs (*and the court*) by posting the supersedeas bond

that the bond would 'secure the prevailing party against any loss sustained as a result of being forced to forgo execution on a judgment during the course of an ineffectual appeal.'" 6 F.3d at 319, P.A. 17 (emphasis added) (quoting *Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979)). In turn, the Edwards "were specifically promised by the court and by Celotex that they could look to the supersedeas bonds if they won on appeal." 6 F.3d at 320, P.A. 20 (emphasis added). The Court should be reluctant to interpret the jurisdictional grant of § 1334(b) in a way that would subvert these judicial promises.

* * *

Finally, Celotex contends that to the extent that the federal rules governing supersedeas bonds conflict with substantive rights conferred under the Bankruptcy Code, the federal rules must "give way." Celotex Br. at 39. But there is no such conflict, any more than the statute withdrawing jurisdiction to enjoin administrative proceedings considered by the Court in *MCorp* conflicted with the broad but general grant of bankruptcy jurisdiction in § 1334(b). The Edwards merely contend that here, as in *MCorp*, the jurisdictional inquiry of whether a proceeding is "related to" a bankruptcy must be informed by a comprehensive understanding of federal law and historical practice.

3. Celotex's Commencement of a Frivolous Adversary Proceeding Against Northbrook and the Edwards Almost Two Years After the Bankruptcy Court Issued Its Stay Order Did Not Give the Bankruptcy Court After-the-Fact Justification To Exercise Jurisdiction over Proceedings Involving the Bond.

Twenty-one months after the bankruptcy court issued its stay order and more than three years after Northbrook acceded to Celotex's request and executed a supersedeas bond in favor of the Edwards, Celotex filed an adversary proceeding in the bankruptcy court seeking to set aside that supersedeas bond. Celotex did not single out the Edwards in this action – Celotex sued *all* 229 beneficiaries of the more than 100 supersedeas bonds that it had posted before the bankruptcy on which its sureties were potentially liable. In its adversary proceeding, Celotex essentially claims that every supersedeas bond that it had posted before it filed for bankruptcy is a "constructive fraudulent transfer" and should therefore be invalidated by the bankruptcy court. Celotex maintains that the bankruptcy court's need to protect Celotex's claim to the property sought in the adversary proceeding necessitates the bankruptcy court's exercise of jurisdiction to stay enforcement of the supersedeas bonds against the sureties. Celotex Br. at 44-45. Northbrook advances the same argument, wishfully characterizing the stay order as an "interlocutory adjunct" to the adversary proceeding, over which the bankruptcy court "unquestionably" has core bankruptcy jurisdiction under 28 U.S.C. § 157. Northbrook Br. at 19.²⁵

²⁵ Although Celotex's adversary proceeding may be a "core proceeding" under 28 U.S.C. § 157, the Edwards vigorously

But the argument that because the bankruptcy court has jurisdiction over the adversary proceeding, it also has jurisdiction to enjoin the Edwards' claim against Northbrook, fails for two reasons. Primarily, and most obviously, the stay order was issued *not* as an "interlocutory adjunct" to the adversary proceeding, but as part of the bankruptcy court's general effort to bring "stability" to Celotex's bankruptcy case. 128 B.R. at 483, P.A. 43. The reliance of the bankruptcy court on the bankruptcy itself, rather than the adversary proceeding, to support its jurisdiction to enter the stay order is made clear by both direct and circumstantial evidence:

- the stay on execution of supersedeas bonds was issued, and reaffirmed twice, *before* Celotex commenced its adversary proceeding;

dispute Northbrook's gratuitous suggestion that the proceeding involves "the restructuring of debtor-creditor relations" rather than "the adjudication of state-created private rights." Northbrook Br. at 19 n.9 (quoting *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 71 (1982)). The Edwards have not filed a claim in the Celotex bankruptcy; the purpose of Celotex's adversary proceeding is to invalidate the Edwards' rights against Northbrook under state fraudulent conveyance law. Celotex's adversary proceeding does not seek the equitable distribution of its assets among its creditors but seeks to recoup additional funds from non-parties for the benefit of the bankruptcy estate. Because the Edwards have not filed claims against the Celotex bankruptcy estate, Celotex's adversary proceeding did not arise "as part of the process of allowance and disallowance of claims" and cannot be considered "integral to the restructuring of debtor-creditor relations." *Granfinanciera v. Nordberg*, 492 U.S. 33, 58 (1989).

- the stay order bears the caption of the bankruptcy case only, and not the caption of the adversary proceeding;
- the stay order does not identify any particular parties enjoined, as required by FED. R. BANKR. P. 7065 and FED. R. CIV. P. 65;
- the bankruptcy court expressly acknowledged in its omnibus stay order of June 13, 1991 that the stay was not connected with any adversary proceeding (indeed, Celotex would not file an adversary proceeding for almost two years), but was intended generally "to insure the integrity of the bankruptcy system and to protect the debtor in the initial stages" of the bankruptcy proceeding, 128 B.R. at 482 n.10, P.A. 40, n.10; and
- in its order declining to lift the omnibus stay on proceeding against supersedeas bonds, the bankruptcy court stated that its stay order was supported *not* by the probability that Celotex would prevail on the merits of its claims in its anticipated adversary proceeding, but by the probability that Celotex would "preserve the estate while simultaneously protecting or avoiding the claims of the judgment creditors." 140 B.R. at 914, P.A. 51.

The bankruptcy court's jurisdiction over the adversary proceeding did not vest – retroactively – the bankruptcy court with jurisdiction to enter a stay order that it was not otherwise authorized to enter.

The second reason that the filing of the adversary proceeding will not support the bankruptcy court's exercise of jurisdiction to stay the Edwards' attempt to

enforce the supersedeas bond against Northbrook is that the proceeding, at least insofar as it relates to the Edwards, is frivolous. Celotex contends that through its adversary proceeding, Northbrook's liability to the Edwards under the supersedeas bond could be reduced or eliminated under two theories. Celotex Br. at 9, 44. First, Celotex suggests that the bankruptcy court could disallow or subordinate the punitive damages component of the Edwards' claim against Celotex under 11 U.S.C. §§ 510(c), 726(a)(4), and 1129(a)(7), and thereby reduce Northbrook's liability to the Edwards. Second, Celotex asserts that the bankruptcy court could invalidate the supersedeas bond as a "constructively fraudulent conveyance[]" under 11 U.S.C. § 544 (in conjunction with applicable Florida law) because in posting the bond Celotex supposedly did not receive "reasonably equivalent value" for its indirect transfer to the Edwards. The first of these theories is belied by the plain language of the Code provisions upon which Celotex relies; the second is so internally illogical, so lacking in support in precedent, and so offensive to federal and state law authorizing the posting of supersedeas bonds to stay execution of judgments that it cannot possibly support the stay order.

As the Edwards have repeatedly noted, they have not asserted *any* claim against Celotex, much less a claim for punitive damages. Their claim under the supersedeas bond is against Northbrook and Northbrook alone. The Code provisions cited by Celotex that authorize disallowance or equitable subordination of claims apply by their terms only to claims against the debtor that would be satisfied out of the bankruptcy estate. See 11 U.S.C. § 502 (applicable to claims, "proof of which is filed under section 501 of this title"); 11 U.S.C. § 726 (describing the

way in which "property of the estate shall be distributed" (emphasis added)); 11 U.S.C. § 1129(a)(7) (describing effect of confirmation on "a holder of a claim" against the debtor). If any doubt as to the bankruptcy court's inability to disallow or equitably subordinate claims made against non-debtors remains after reading those provisions, it is eliminated by 11 U.S.C. § 524(e). That section specifically provides that, absent certain exceptions inapplicable here, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." Thus, regardless of how the bankruptcy court resolves Celotex's adversary action to disallow or equitably subordinate punitive damages claims, it cannot possibly affect the Edwards' claim against Northbrook on the supersedeas bond.²⁶

Celotex's second contention – that the supersedeas bond in favor of the Edwards may be avoided as a "fraudulent conveyance" – is even more bizarre. Celotex's argument hinges on the suggestion that Celotex did not receive "reasonably equivalent value" for posting the bond because "the recipient [presumably the Edwards] gave *no* value" to Celotex. Celotex Br. at 44 (emphasis in original). Such a contention defies the unambiguous terms of 11 U.S.C. § 548(d)(2)(A), which specifically defines value to include "the satisfaction or securing of a present or antecedent debt of the debtor." 11 U.S.C. § 548(d)(2)(A) (emphasis added). Moreover, Celotex's

²⁶ See *Keene Corp. v. Acstar Ins. Co. (In re Keene)*, 162 B.R. 935, 945-49 (Bankr. S.D.N.Y. 1994) (rejecting debtor's contention that disallowance or equitable subordination of punitive damage portions of final judgments against debtor could affect sureties' liability under supersedeas bonds, and thus denying injunction against enforcing the bonds against the sureties).

contention that the stay of execution that it sought and obtained under Rule 62(d) by posting the bond was not "reasonably equivalent value" for any indirect transfer that it made to the Edwards in order to obtain the stay is irreconcilable with this Court's recognition that the very purpose of supersedeas bonds is to benefit the judgment debtor by preventing immediate execution. *See, e.g., American Surety Co. of New York v. Schultz*, 237 U.S. 159, 162 (1915) (noting that the stay obtained by posting a supersedeas bond "was helpful to the defendant"). It was not the Edwards, but Celotex, that desired, and benefitted from, a stay of execution. Celotex's assertion that it did not receive value from the stay is simply untenable as a matter of common sense.

In *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757 (1994), this Court recognized that transactions regulated by state law cannot validly be attacked as fraudulent conveyances in an adversary action in a bankruptcy case. In *BFP*, the Court considered whether the sale of the debtor's mortgaged property at a foreclosure sale conducted under state law could be challenged as a fraudulent conveyance under § 548 of the Bankruptcy Code. The debtor contended that because the property was sold for far less than its fair market value, the debtor "received less than a reasonably equivalent value" in exchange for the transfer of its interest in the property within the meaning of § 548(d)(2)(A), and that the transfer was therefore avoidable. *Id.* at 1759. The Court rejected the contention, holding that the price paid for property at a state-authorized foreclosure sale conclusively establishes the "reasonably equivalent value" of the property. *Id.* at 1765. The Court noted that states have an interest in insuring the security of titles to real estate, and that state laws and procedures

regulating minimum prices at state foreclosure sales promote that interest. *Id.* at 1764-65. To allow debtors to use the bankruptcy laws to attack sales of property made in compliance with state law, the Court reasoned, "would have a profound effect upon that [state] interest: the title of every piece of realty purchased at foreclosure would be under a federally created cloud." *Id.* at 1765. Although the Court acknowledged that Congress has the power to "disrupt the ancient harmony" between foreclosure law and fraudulent conveyance law, it refused to presume a Congressional intent to disrupt that harmony, using language directly applicable to the case at bar:

The Bankruptcy Code can of course override by implication when the implication is unambiguous. But *where the intent to override is doubtful, our federal system demands deference to long established traditions of state regulation.*

Id. at 1765 (emphasis added).

Celotex's contention that Congress intended to displace time-honored state and federal procedures for staying and securing court judgments in enacting § 544 of the Code is even less plausible. On the contrary, it is hard to imagine that Congress intended to permit a debtor to attack as "constructively fraudulent" a transfer that the debtor had voluntarily made pursuant to state or federal law more than a year before filing bankruptcy in order to obtain a stay of execution of a judgment pending appeal.

The language of the Code, and this Court's opinion in *BFP*, expose Celotex's adversary proceeding against the Edwards as pretextual and frivolous. Thus, even if the bankruptcy court's stay order can properly be considered an "adjunct" to the adversary proceeding, which the

Edwards deny, that proceeding still did not provide a colorable jurisdictional basis for the bankruptcy court to enjoin the Edwards' action against Northbrook.²⁷

II. PRINCIPLES OF COMITY DID NOT OBLIGATE THE FIFTH CIRCUIT TO ENFORCE THE BANKRUPTCY COURT'S STAY ORDER.

Celotex correctly recites the rule stated by this Court in *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 386 (1980), that "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." But Celotex overlooks what one court has called the "principal qualification" of the GTE rule: "that the court which issued the order must have had jurisdiction to do so." *Illinois v. Department of Health & Human Services*, 594 F. Supp. 147 (N.D. Ill. 1984) (holding that because the federal court that issued a prior injunctive order had lacked jurisdiction to do so, the order was "void *ab initio*" and not binding on the litigants), *aff'd*, 772 F.2d 329 (7th Cir. 1985). Similarly, the cases upon which Northbrook relies to support its contention that comity requires deference to prior orders issued by other courts presuppose that the court entering the prior order had jurisdiction to do so. See, e.g., *Kerotest Mfg. Co. v. C-O Two Fire Equip. Co.*, 342 U.S. 180 (1952); *Lapin v. United States*,

²⁷ Indeed, if the stay order were tied to the adversary proceeding, which it was not, it could accurately be characterized as "transparently invalid" with only "a frivolous pretense to validity." *Walker v. City Birmingham*, 388 U.S. 307, 315 (1967).

333 F.2d 169 (9th Cir.), *cert. denied*, 379 U.S. 904 (1964). *Kerotest*, GTE, and their progeny are simply inapplicable in the instant case, in which the Edwards contend (and the Fifth Circuit concluded) that the bankruptcy court's order exceeded its jurisdiction and was patently invalid.

Northbrook nevertheless insists that the Fifth Circuit's decision condoning the Edwards' collateral attack on the bankruptcy court's stay order is "unseemly" and violates general "principles of comity and federal jurisdiction." Northbrook Br. at 24-25. Northbrook has it backwards. It is the bankruptcy court, by seeking to exercise jurisdiction over claims to property in which the debtor can colorably claim no interest, that has failed to accord the requisite deference to proceedings in other courts. The supersedeas bond that the Edwards seek to enforce had been duly approved by order of the court in which it was deposited. The district court in Texas that approved the bond, not the bankruptcy court in Florida, was the appropriate court to determine the Edwards' right to the bond. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976) ("the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts"); *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964) (in proceedings in rem or quasi in rem, "the state or federal court having custody of such property has exclusive jurisdiction to proceed"). The Fifth Circuit justifiably and properly disregarded the bankruptcy court's extra-jurisdictional attempt to interfere with the proceedings in Texas, which were authorized by federal law.

Celotex suggests that affirmance of the Fifth Circuit's ruling would invite "conflict and chaos," because "federal courts would be free to collaterally attack and second-guess the orders of all other such courts - simply

because the deciding court disagrees with the merits of the other court's ruling." Celotex Br. at 36. Celotex's concern is hyperbolic and unwarranted. The Fifth Circuit disregarded the bankruptcy court's order not because it simply disagreed with it, but because the bankruptcy court lacked jurisdiction or power to interfere with the rights of parties not before it. If the Fifth Circuit's decision is affirmed, collateral attacks on bankruptcy court orders will continue to be appropriate only in those rare instances where, as here, a court attempts to exercise jurisdiction clearly beyond that delegated to it by Congress.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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No. 93-1504

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1993

THE CELOTEX CORPORATION,

Petitioner,

v.

BENNIE EDWARDS and JOANN EDWARDS,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

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RULE 29.1 STATEMENT

Celotex's statement for purposes of this Court's Rule 29.1, which appears at Brief for Petitioner at ii, remains accurate.

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No. 93-1504

—◆—
In The
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THE CELOTEX CORPORATION,

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v.

BENNIE EDWARDS and JOANN EDWARDS,

Respondents.

—◆—
On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit
—◆—

REPLY BRIEF FOR PETITIONER
—◆—

The Edwardses concede that the judgment of the Fifth Circuit must be reversed if the Florida bankruptcy court had subject matter jurisdiction to issue its stay of execution upon Celotex's supersedeas bonds. *See* Brief for Respondents at 16, 19-48.

Indeed, it is undisputed that Federal Rule of Civil Procedure 65.1 does not permit enforcement of a bond, where a court in another circuit has issued an order pursuant to 11 U.S.C. §105(a) staying enforcement, *unless that stay is subject to collateral attack*. *See* Brief for Respondents at 16, 19-48. In this case, the only ground advanced in support of the Edwardses' admitted collateral attack is that the Florida bankruptcy court lacked subject matter jurisdiction to issue its stay. *See id.* at 16, 19, 21-48.

The Edwardses' argument that the bankruptcy court lacked subject matter jurisdiction is without merit. The

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA —
TAMPA DIVISION

In the Matter of:

Chapter 11

THE CELOTEX CORPORATION, Consolidated Case Nos.
et al. 90-10016-8B1
90-10017-8B1

Debtors

**OMNIBUS ORDER ON MOTION TO LIFT
STAY WITH REGARD TO CELOTEX
APPEALS AND TO RELEASE
SUPERSEDEAS BONDS THEREON**

THIS CAUSE came on for consideration upon the (1) Motion Challenging Jurisdiction of Court over Property of Non-Debtors, (2) Motion to Lift Stay with Regard to Celotex Appeals and to Release Supersedeas Bonds Thereon, and (3) related issues raised by the enormous litigation in this case. By Order entered January 10, 1991, the Court denied the Motion Challenging Jurisdiction of Court over Property of Non-Debtors and granted, in part, the Motion to Lift Stay with Regard to Celotex Appeals and to Release Supersedeas Bonds Thereon. Specifically, the Court lifted the stay to enable the pending appellate actions to proceed but did not lift the stay with respect to the supersedeas bonds which Debtor posted in order to obtain stays pending appeals of the underlying litigations. One of the remaining issues is whether the supersedeas bonds posted by Debtor are property of the bankruptcy estate subject to the automatic stay and thus not available for payment to the asbestos-related bodily injury plaintiffs should their cases ultimately be affirmed on appeal. The Court finds such a determination to be a core proceeding. 28 U.S.C. § 157(b)(2)(A), (G), (O). *See also LTV Corp. v. Aetna*

Casualty and Surety Co. (In re Chateaugay Corp.), 116 B.R. 887 (Bankr. S.D.N.Y. 1990); *Garrity v. Leffler (In re Neuman)*, 71 B.R. 567 (S.D.N.Y. 1987).

The Court, having considered the Motions, the record, and the memoranda of law submitted by the interested parties,¹ finds:

The Celotex Corporation and Carey Canada Inc. (collectively referred to as "Debtor") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code (11 U.S.C.) on October 12, 1990. At the time the petition was filed, over 141,000 asbestos-related bodily injury lawsuits were pending

¹ In the Order entered January 10, 1991, the Court directed Debtor and Movants (Asbestos Plaintiffs represented by the law firm of Wellborn, Houston, Adkinson, Mann & Sadler) to file legal memoranda addressing the issue of whether the supersedeas bonds are property of the estate. In addition, the Unsecured Trade Creditors Committee and B. Mills Latham submitted legal memoranda on the status of the supersedeas bonds. The Unsecured Trade Creditors Committee felt compelled to set forth its views on the supersedeas bond issue since resolution of that issue will have a direct and material effect upon all creditors of the estate. Latham, on November 28, 1990, was ordered to show cause why he should not be held in contempt for seeking release of a supersedeas bond posted by Debtor to obtain a stay pending appeal in *Celotex Corp. v. Tate*, Court of Appeals of Texas, Thirteenth Judicial District, Corpus Christi, No. 13-89-444-CV, contrary to this Court's Order of October 17, 1990. At the hearing held December 11, 1990, on the order to show cause, the Court directed Latham to file a memorandum on the supersedeas bond issue.

In addition to the memoranda filed by Movants, Debtor, the Unsecured Trade Creditors Committee, and Latham, memoranda on the supersedeas bond issue were filed by Marion George, the Asbestos-Related Personal Injury Creditors, hospital members of the American Hospital Association, the Unofficial Asbestos Health Claim Co-Defendants Committee, the Asbestos Property Damage Claimants, Greitzer and Locks, and Danny W. Berlin.

against Debtor.² On that date over 100 appeals were pending in asbestos-related bodily injury cases in which Debtor and others were appealing adverse judgments. Three of those pending appeals are of particular interest to this case.

On April 3, 1989, the United States District Court for the Eastern District of Texas entered a judgment against Debtor in the total amount of \$2,593,625. *King v. Armstrong World Indus.*, No. M-85-44-CA. Debtor appealed this adverse judgment to the United States Court of Appeals for the Fifth Circuit.³ In order to stay execution of the judgment pending appeal, Debtor posted a supersedeas bond issued by Northbrook Property and Casualty Insurance Company. The bond was executed on May 17, 1989, and approved by the District Court on May 26, 1989. Insurance proceeds were used as collateral to secure the bond issued by Northbrook.

On November 1, 1989, the District Court for the Fourth Judicial District, Rusk County, Texas, entered a judgment against Debtor in the total amount of \$5,379,299.50. *Pool v. Fibreboard Corp.*, No. 86-363, and *Williams v. Fibreboard Corp.*, No. 88-08-293. The damage award was comprised of \$4,179,299.50 in compensatory damages⁴ and \$1,200,000 in

² The Celotex Corporation is a major manufacturer of building and roofing products for residential and commercial use. Carey Canada Inc. had been a miner of raw chrysotile asbestos fibers. In addition to the pending asbestos-related bodily injury lawsuits, Debtor also has been a defendant in 310 asbestos-related property damage lawsuits.

³ The Court of Appeals has affirmed the judgment of the District Court. *King v. Armstrong World Indus.*, 906 F.2d 1022, *reh'g denied*, 914 F.2d 251 (5th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3793 (1991).

⁴ Debtor's liability for compensatory damages was joint and several with four or five co-defendants. The jury determined Debtor's portion of the liability was either 15% or 25% depending upon the particular asbestos plaintiff. The trial court determined that each defendant have contribution and indemnity against each other defendant in accordance with the percentage findings of the jury.

punitive damages. Debtor appealed this adverse judgment to the Court of Appeals of Texas, Sixth Judicial District, Texarkana. In order to stay execution of the judgment pending appeal, Debtor posted two supersedeas bonds issued by National Union Fire Insurance Company of Pittsburgh, Pa. Each bond was executed on February 1, 1990. A combination of cash and insurance was used as collateral to secure each bond issued by National Union.

On January 22, 1990, the United States District Court for the Eastern District of Texas entered a judgment against Debtor in the total amount of \$6,417,625. *Glasscock v. Armstrong Cork Co.*, No. M-85-158-CA. Debtor appealed this adverse judgment to the United States Court of Appeals for the Fifth Circuit. In order to stay execution of the judgment pending appeal, Debtor posted a supersedeas bond issued by National Union Fire Insurance Company of Pittsburgh, Pa. The bond was executed on February 5, 1990, and approved by the District Court on February 7, 1990. A combination of cash and insurance was used as collateral to secure the bond issued by National Union.

I.

The genesis of any review of whether a supersedeas bond is property of the estate is the pre-code decision of the Court of Appeals for the Third Circuit in *Mid-Jersey National Bank v. Fidelity-Mortgage Investors*, 518 F.2d 640 (3d Cir. 1975). From that opinion black letter law has been ascribed by some: a supersedeas bond is not property of the estate, thus the automatic stay pursuant to Section 362 of the Bankruptcy Code does not preclude the judgment creditor from going against the surety bond. See *W.W. Gay Mechanical Contractor v. Wharfside Two*, 545 So.2d 1348 (Fla. 1989); *J.M. Beeson Co. v. Sartori*, 553 So.2d 180 (Fla. 4th DCA 1989).

From *Mid-Jersey* we learn a deposit of funds by the Debtor with the Clerk of the Court in lieu of a supersedeas bond is *in custodia legis*. The Third Circuit in *Mid-Jersey* determined the

debtor had a "contingent reversionary interest as a potential beneficiary of the trust" in that supersedeas bond. See also *Vescovo v. First State Bank (In re Vescovo)*, 125 B.R. 468, 471 (Bankr. W.D. Tex. 1990). Such a characterization has interesting connotations as well as incongruities. First, basic property law would suggest a reversionary interest is never contingent but is vested subject to divestment. Second, since the debtor, as applicant, may be successful on appeal, the debtor must be deemed under the *Mid-Jersey* theorem to be a potential beneficiary under the trust.⁵ In such light, an argument can be made that the debtor has a property interest in a supersedeas bond. Section 541(a)(1) of the Bankruptcy Code states "all legal or equitable interests of the debtor in property as of the commencement of the case" is property of the estate "wherever located and by whom-ever held." Third, if the debtor holds a future interest or an equitable interest as a beneficiary of a trust under *Mid-Jersey*, that interest must be property of the estate even if that interest is subject to divestment.⁶

Parenthetically, one must remember the dichotomy between the supersedeas bond and the surety agreement and collateral securing the bond when making this analysis. The latter two are property of the estate. Whether a debtor can reject or assume the surety agreement or avoid it and thus seek return of

⁵ Such a deposit is likened to a trust where the court is the trustee with the duty to determine the beneficiaries at the end of the appellate process. See *Gnidovec v. Alwan (In re Alwan Bros.)*, 105 B.R. 886 (Bankr. C.D. Ill. 1989).

⁶ If some trust theory is to be used, this Court would suggest utilizing a resulting trust theory rather than making the debtor a beneficiary of some hypothetical trust.

the collateral may be an issue solely between the debtor and its surety.⁷ The status of the supersedeas bond is a distinct, but interconnected, issue.

This Court has reviewed *Mid-Jersey* and its progeny. The *Mid-Jersey* court, considering pre-Code law, did not have before it the expansive views established by Congress in Section 541 and Section 362 of the Bankruptcy Code. The other courts which have reviewed the issue of supersedeas bonds as property of the estate appear to have adopted the *Mid-Jersey* rubric without an analysis of the appellate process vis-a-vis the Bankruptcy Code. *Moran v. Johns-Manville Sales Corp.*, 28 B.R. 376, 377, 378 (N.D. Ohio 1983); *Johns-Manville Corp. v. Asbestos Litigation Group (In re Johns-Manville Corp.)*, 26 B.R. 420, 433 (Bankr. S.D.N.Y. 1983); *W.W. Gay Mechanical Contractor*, 545 So.2d at 1350; *J.M. Beeson Co.*, 553 So.2d at 181.

⁷ While these matters may not add any greater status to the bond as property of the estate, they have been of concern to the reorganizational process. See *Kellogg v. Blue Quail Energy Inc. (In re Compton Corp.)*, 831 F.2d 586 (5th Cir. 1987); *In re Chateaugay Corp.*, 116 B.R. at 896-899.

Any inquiry into the status of the surety bond and any collateralization by the debtor may include:

1. The contract establishing the bond.
2. The characterization of the contract under bankruptcy or non-bankruptcy law.
3. The distribution of any collateral held as security for the bond.
4. The status of any security in the bankruptcy proceeding.

For the most part, these issues arise between the debtor and its surety when the bond is not court-affiliated such as a deposit with the clerk. It is this Court's opinion that whether the underlying bond is property of the estate is not predicated upon a determination that a judgment is a fraudulent transfer or the surety contract is executory.

II.

As to federal litigation, Rule 62(d) of the Federal Rules of Civil Procedure permits an appellant to stay execution of the judgment by posting a bond.⁸ Thus, the judgment creditor is protected by the supersedeas bond during the pendency of the appeal. See *Prudential Ins. Co. v. Boyd*, 781 F.2d 1494, 1498, *reh'g denied*, 788 F.2d 1570 (11th Cir. 1986); see also *Avirgan v. Hull*, 125 F.R.D. 185 (S.D. Fla. 1989). Only when the appellate process is concluded is the judgment creditor able to take action against the bond and the surety.

The act of filing a petition in bankruptcy during the pendency of an appellate case does not alter the operation of Rule 62 of the Federal Rules of Civil Procedure nor allow the judgment creditor or its agents to proceed upon some perfervid, yet fallacious, belief that it is now open season on the supersedeas bond.⁹ By the filing of the petition, the automatic stay is activated and all proceedings against a debtor, including appellate proceedings, are stayed. 11 U.S.C. § 362(a)(1). See *O'Neill v. Continental Airlines (In re Continental Airlines)*, 928 F.2d 127 (5th Cir. 1991); *Balaber-Strauss v. Reichard (In re Tampa Chain Co.)*, 835 F.2d 54 (2d Cir. 1987); *Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60 (6th Cir. 1983); *cert. denied*, 478 U.S. 1021 (1986). Moreover, any act to obtain possession

⁸ Most states provide similar protection to a judgment creditor. See e.g. Fla. R. App. P. 9.310. See also Fed. R. Civ. P. 65.1; Bankruptcy Rule 9025.

⁹ Generally, it is in the best interest of the estate to lift the automatic stay to allow the appellate process to be completed. Once the decision of the appellate court is final, the status of the supersedeas bond as property of the estate can be ascertained. See *Atlantic Richfield Co. v. Good Hope Refineries*, 604 F.2d 865 (5th Cir. 1979). This Court has consistently granted relief from the stay to allow any pending asbestos-related bodily injury appeal to be concluded.

of, or exercise control over, any property of the estate is stayed. 11 U.S.C. § 362(a)(3).

If at the time of filing the petition the appellate process has not been concluded, the debtor still has an interest in the supersedeas bond cognizable under Section 541 of the Bankruptcy Code subject to the interest being divested if the debtor is unsuccessful once the appellate process is completed. Fed. R. App. P. 41(a). See *Saper v. West*, 263 F.2d 422 (2d Cir.), cert. denied, 360 U.S. 916 (1959). This approach is correct, for otherwise all supersedeas bonds in place at the time of the filing of the petition in bankruptcy, notwithstanding the status of any appellate process, would be subject to attack by the judgment creditor as not being property of the estate. Continuing protection of the bond during the appeal is consistent with *Mid-Jersey*, 518 F.2d at 644. See also *Grubb v. Federal Deposit Ins. Corp.*, 833 F.2d 222 (10th Cir. 1987).

If such were not the case, the debtor, after a successful appeal, would have some new cognizable rights or property coming back from the release of the supersedeas bond now magically becoming property of the estate. If a reorganization plan had been confirmed by the time the appellate process was concluded, a debtor could claim these returning bond funds are not available to creditors. 11 U.S.C. § 1141(b). The Court of Appeals for the Seventh Circuit in *Sheldon v. Munford, Inc.*, 902 F.2d 7 (7th Cir. 1990), clearly saw all these contingencies and their attendant results when it denied a judgment creditor's attack on the debtor's supersedeas bond during the appellate process.

III.

Where a debtor, upon the filing of the bankruptcy petition, is an unsuccessful appellant in the total appellate process, or during the bankruptcy case is unsuccessful in its appeal, its property interest in the bond can be divested and any efforts by

the debtor to prevent the judgment creditor from proceeding against the supersedeas bond must be sought under Section 105 of the Bankruptcy Code.

Upon Debtor's filing its bankruptcy petition, this Court entered an order pursuant to Section 105 which sought to augment the stay protection afforded by Section 362(a). Such order was upon Debtor's motion and was for the purpose of precluding, among other things, judgment creditors from proceeding in various state and federal courts against supersedeas bonds without first coming before this Court.¹⁰

The implementation of the Section 105 stay was required because of the complexity of Debtor's case. There are over 41,000 asbestos-related bodily injury cases pending against Debtor in almost every state and federal jurisdiction. There are over 100 asbestos-related bodily injury cases on appeal. Judgments totaling nearly 70 million dollars are being stayed by the supersedeas bonds posted by Debtor while the appellate processes proceed. All supersedeas bonds are secured by property of Debtor's estate.

¹⁰ While a few judgment creditors have proceeded against the supersedeas bonds without first coming before this Court, so far few have claimed this Court lacks authority to issue a Section 105 stay without Debtor's filing an adversary proceeding. While Bankruptcy Rule 7001 requires an adversary proceeding if a party is seeking an injunction, this Court believes the plain language of Section 105 allows this Court *sua sponte*, to enter a stay order against any and all parties for specific or general purposes in order to ensure the integrity of the bankruptcy system and to protect the debtor in the initial stages of a reorganization proceeding. See *LTV Steel Co. v. Board of Educ. of the Cleveland City School Dist. (In re Chateaugay Corp.)*, 93 B.R. 26, 29 (S.D.N.Y. 1988); *Findley v. Blinken (In re Joint E. and S. Dists. Asbestos Litig.)*, 120 B.R. 648, 658 (E. & S.D.N.Y. 1990); *In re Lamar Estates, Inc.*, 5 B.R. 328 (Bankr. E.D.N.Y. 1980). See also *In re Roberts*, 68 B.R. 1004 (Bankr. E.D. Mich. 1987).

Further, many of the pending asbestos-related bodily injury cases involve a number of co-defendants which are now in bankruptcy. Because of the automatic stay with respect to Debtor's and co-defendants' cases, various asbestos-related litigation throughout the United States has come to a halt. Similarly, the use of multi-district litigation procedures is not available. See Judicial Conference of the United States, Report of the Ad Hoc Committee on Asbestos Litigation (March 1991). In light of the fact 28 U.S.C. § 157 precludes this Court from liquidating the asbestos-related bodily injury cases, other than estimating claims for voting purposes, there is a potential this Court will be faced with thousands, perhaps tens of thousands, of motions to lift the stay to proceed in the various trial courts notwithstanding the fact 28 U.S.C. § 157(b)(5) does not provide an expeditious method of dealing with these asbestos-related bodily injury cases.¹¹ If there is potential peripheral personal injury litigation which will circumvent the review process of either the bankruptcy court or the district court and distort the reorganization process, then Section 105 must be used. See *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988).

At the time of filing its petition, Debtor had been engaged in continuous litigation relating to insurance coverage on asbestos-related injury claims. Debtor, asbestos litigation co-defendants and various insurance companies struck a pre-petition agreement which created a dispute resolution mechanism to facilitate claims

¹¹ The nexus between Section 362(a) and 28 U.S.C. § 157 is perfectly illustrated in debtor's case. Section 362 stays all judicial action against Debtor. If litigants/creditors wish to proceed, they must seek relief from the stay in bankruptcy court. The bankruptcy court, pursuant to 28 U.S.C. § 157(b)(2)(B), cannot deal with personal injury claims and can only provide relief by allowing the litigants to proceed to district court where it, as gatekeeper over such claims, determines where they will be liquidated. 28 U.S.C. § 157(b)(5).

settlements. The internal inability of this alternative dispute resolution system to proceed, coupled with other litigation over insurance coverage, has frustrated the tort litigation peripheral to this bankruptcy case. These factors complicate any procedures to deal with known asbestos claimants as well as those whose claims arose prior to the filing of the bankruptcy, but whose injuries have not yet manifested themselves. In light of the inability of the *Johns-Manville* trust to handle such potential claims, this Court finds it abundantly necessary to stay any and all parties from proceeding against Debtor in any forum until a determination can be made of the efficacy of any remedy, claim, or assertion of jurisdiction. Failure to bring such stability to Debtor's case in its initial stages would place this bankruptcy case on the dangerous edge of things. *Erti v. Paine Webber Jackson and Curtis, Inc. (In re Baldwin-United Corp. Litig.)*, 765 F.2d 343, 349 (2d Cir. 1985).

The federal courts of appeals, upon viewing injunctions granted during pandemic tort-bankruptcy cases such as this have consistently understood these circumstances and have endorsed the jurisdiction and utilization of a stay as a case management control mechanism. The Court of Appeals for the Second Circuit in the *Johns-Manville* bankruptcy acknowledged Section 105 as an authorized instrumentality to preclude actions which may "impede the reorganization process." *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89, 93 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988). The Court of Appeals for the Fourth Circuit in *A.H. Robins* twice upheld the stay mechanism to thwart actions "which will have an adverse impact on the Debtor's ability to formulate a Chapter 11 plan." *A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986); *Oberg v. Aetna Casualty and Surety Co. (In re A.H. Robins)*, 828 F.2d 1023 (4th Cir. 1987), *cert. denied*, 485 U.S. 969 (1988). In the latter decision, the Fourth Circuit clearly took the position that the bankruptcy court could stay litigation which would create a "substantial burden on ... [the debtor], detract[ing] from the

reorganization process." *In re A.H. Robins*, 828 F.2d at 1026. In another asbestos case, the Court of Appeals for the Fifth Circuit affirmed the bankruptcy court's jurisdiction to use Section 105 to stay personal injury suits filed by asbestos workers against debtors, insurers, and executives. *In re Davis*, 730 F.2d 176 (5th Cir. 1984).

These decisions reinforce fundamental bankruptcy policy to stop ongoing litigation and to prevent peripheral court decisions from dealing with issues, properties, or entities involved in a debtor's reorganization process without first allowing the bankruptcy court to have an opportunity to review the potential effect on the debtor. Where bankruptcy courts in "mega" cases such as this case are required to deal with complex litigation involving numerous parties, joint and several liability, and multi-million dollars in claims and assets, not to mention potential conflicts with other judicial determinations, the powers of the bankruptcy court under Section 105 must in the initial stage be absolute, unless limited by the Bankruptcy Code or other federal laws. Clearly, the role of Section 105 in this type of case is first to protect the reorganization process.

IV.

As to the utilization of Section 105 vis-a-vis the supersedeas bonds, once the judgment creditor has been successful throughout the appellate process, the judgment creditor is not able to proceed against the supersedeas bond without seeking to vacate the Section 105 stay should continue. The Court's inquiry will include Debtor's ability to avoid any final judgment under the Bankruptcy Code and the necessity to protect its sureties or disenfranchise them if such surety agreements can be considered executory contracts or avoided under the avoiding powers in the Bankruptcy Code. (11 U.S.C. §§ 365, 547, and 548.) Additionally, consideration will be given to Debtor's ability to deal with the targeted litigation within the reorganization plan and the

effect on that process if the Section 105 is extinguished. The analysis may also include the treatment of those judgments which include punitive damages¹² or joint and several liability or contribution with other asbestos co-defendants. This Court does not seek to establish an exhaustive list of inquiry, as each specter of the Section 105 stay may relate differently to an aspect of Debtor's reorganization process which seeks to be protected. At this juncture the Section 105 stay is more analogous to the protection of third parties as provided for in *A.H. Robins and Johns-Manville* than it is to some aberration as some would postulate.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that:

1. The supersedeas bond is property of the estate as long as the appellate process upon which it is based is proceeding, and the automatic stay of Section 362 applies to any action to enforce a judgment against the supersedeas bond.
2. Where this Court has granted relief from the stay to complete the appellate proceedings involving Debtor and the appellate process has concluded in favor of the judgment creditor, that judgment creditor is precluded from proceeding against

¹² Section 726(a)(4) of the Bankruptcy Code provides that punitive damages are fourth in line for distribution in a Chapter 7 liquidation. Although Section 726(a)(4) is inapplicable to Chapter 11 reorganizations (*In re A.H. Robins Co.*, 89 B.R. 555, 560 (E.D. Va. 1988); *In re Alwan Bros.*, 115 B.R. 148, 151 (Bankr. C.D. Ill. 1990)), it is well-established that bankruptcy courts have inherent equitable power to disallow, limit, or subordinate claims for punitive damages in Chapter 11 reorganizations. *In re A.H. Robins Co.*, 89 B.R. at 562; *In re Apex Oil Co.*, 118 B.R. 683, 699 (Bankr. E.D. Mo. 1990); *In re Johns-Manville Corp.*, 68 B.R. 618, 627 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987).

any supersedeas bond without first seeking to vacate the Section 105 stay in this Court.

3. Where at the time of filing the petition, the appellate process between Debtor and the judgment creditor had been concluded, the judgment creditor is precluded from proceeding against any supersedeas bond posted by Debtor without first seeking to vacate the Section 105 stay entered by this Court. It is further

ORDERED, ADJUDGED AND DECREED except as to this Court's orders granting relief from the automatic stay to complete the appellate process, Movants' Motion to Lift Stay with Regard to Celotex Appeals and to Release Supersedeas Bonds Thereon is denied. It is further

ORDERED, ADJUDGED AND DECREED the Section 105 stay entered by this Court on October 17, 1990, continued in effect.

DONE AND ORDERED at Tampa, Florida on June 13, 1991.

THOMAS E. BAYNES, JR.
U.S. Bankruptcy Judge

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United States Trustee

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Attorney for Appellees

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE: Chapter 11

THE CELOTEX
CORPORATION and
CAREY CANADA INC., Consolidated Case Nos.:
90-10016-8B1 and
90-10017-8B1

Debtors.

THE CELOTEX CORPORATION and
CAREY CANADA INC.,

Plaintiffs,

Adversary No.: 92-584

v.

ALLSTATE INSURANCE
COMPANY and each
of the Defendants identified on
Schedule A,

Defendants.
_____ /

**SECOND AMENDED COMPLAINT TO AVOID AND
RECOVER PREFERENTIAL AND
CONSTRUCTIVELY FRAUDULENT TRANSFERS
MADE FOR THE BENEFIT OF BONDED
CLAIMANTS, TO DISALLOW,
OR IN THE ALTERNATIVE, SUBORDINATE
PUNITIVE DAMAGE AWARDS, TO DISALLOW
POST-PETITION INTEREST AND UNMATURED
INTEREST, TO DISALLOW POST-PETITION BOND
PREMIUMS AND TO ENJOIN CERTAIN ACTIONS
AGAINST SURETIES**

The Celotex Corporation ("Celotex") and Carey Canada Inc., ("Carey Canada") debtors and debtors-in-possession, collectively (the "Debtors"), in the above-captioned administratively consolidated Chapter 11 case, bring this action pursuant to Bankruptcy Rules 6010 and 7001 and §§105, 502, 503, 510, 544, 547, 548, and 550 of the Bankruptcy Code (the "Code") seeking entry of a judgment: a) declaring that certain transfers of interests in property of the Debtors (the "Transfers") for the benefit of the bonded judgment creditors (the "Bonded Claimants") are avoidable as preferential and constructively fraudulent; b) providing for recovery of those preferential and constructively fraudulent transfers of the Debtors' property; c) subordinating the claims of the Bonded Claimants to share equally with the other asbestos bodily injury claimants (the "Bodily Injury Claimants"); d) declaring that all punitive damage awards in favor of Bonded Claimants are disallowed; or alternatively, e) subordinating all punitive damage awards in favor of Bonded Claimants to the claims of the unsecured creditors of the Debtors; f) disallowing all post-petition interest and any unmatured interest; g) disallowing post-petition bond premiums; and h) enjoining certain actions against surety companies by channeling the claims of the Bonded Claimants from the sureties to the property interests of the Debtors recovered through this action.

NATURE OF ACTION

1. The Debtors filed voluntary petitions for relief under Chapter 11 of the Code on October 12, 1990 (the "Petition Date"), in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division. The Chapter 11 cases of the Debtors have been consolidated for procedural purposes only and are being jointly administered pursuant to an order of this Court.

2. The Debtors are defendants in lawsuits involving approximately 140,000 claimants in state and federal courts throughout the United States. These suits seek damages, including punitive damages, from the Debtors for alleged liabilities arising as a result of exposure to asbestos or asbestos-containing products.

3. The automatic stay pursuant to §362 of the Code and this Court's Order Granting Emergency Motion for Determination of Applicability of §362 Stay to Pending Matters or, in the Alternative, for Extension of §362 Stay to Pending Matters entered October 17, 1990 (the "§105 Stay Order") implemented a stay as to all actions involving the Debtors. Pursuant to the §105 Stay Order, all entities were stayed, restrained, or enjoined from commencing or continuing a judicial, administrative or other proceeding involving the Debtors, regardless of who initiated the proceeding, whether the matter was on appeal and a supersedeas bond had been posted by the Debtors, or, whether the appeal was by one of the Debtors.

4. Sections 544, 547 and 548 of the Code provide the authority to avoid preferential and constructively fraudulent transfers, and §550 of the Code establishes the procedure to recover preferentially and constructively fraudulently transferred property. From §502 of the Code arises the statutory authority to disallow punitive damage awards, as well as post-petition

interest and unmatured interest. Section 503 of the Code provides the authority to disallow post-petition bond premiums. Section 510 of the Code provides the authority to subordinate the claims of the Bonded Claimants, based on equitable considerations, to share equally with all other Bodily Injury Claimants. Further, this Court derives from §105 of the Code the inherent equitable authority to channel claims into the bankruptcy forum by enjoining the prosecution of claims in other forums.

5. The entry of a judgment granting the relief sought herein by the Debtors is essential, because absent such a judgment, the likelihood of implementing a successful reorganization plan and concomitant equitable distribution of the Debtors' assets will be seriously impaired. As this Court has both the unique jurisdiction and authority to grant the requested relief, it is imperative that this Court issue such a judgment.

JURISDICTION AND VENUE

6. This proceeding is initiated pursuant to Bankruptcy Rule 7001 which provides the basis for instituting this adversary proceeding.

7. This Court has jurisdiction of this action as a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (B), (H) and (O), as the matter: (1) involves issues central to the administration of the Debtors' estates; (2) concerns the avoidability and recovery of preferential and fraudulent conveyances; (3) concerns the allowance or disallowance of punitive damage claims against the Debtors' estates; (4) affects the adjustment of debtor/creditor relationships; and (5) raises issues central to the confirmation of any plan of reorganization. Additionally, this Court has jurisdiction of this action pursuant to 28 U.S.C. §1334(b), as a civil proceeding arising in or related to the Debtors' administratively consolidated Chapter 11 cases, and pursuant to 11 U.S.C. §1334(d), as a case involving property of the Debtors and their estates.

8. Venue is proper in this Court pursuant to 28 U.S.C. §1409(a), as a proceeding arising in or related to a case commenced in this district under Title 11 of the Code.

PARTIES

9. Plaintiff Celotex is a Delaware corporation with its principal place of business at 4010 Boy Scout Boulevard, Tampa, Florida 33607. Plaintiff Carey Canada is a corporation organized under the laws of Canada with its principal place of business in Quebec, Canada. Carey Canada is a wholly-owned subsidiary of Celotex.

10. This proceeding involves two classes of Defendants: (1) the insurance companies and their affiliated surety companies (collectively the "Sureties") that issued the supersedeas bonds (collectively the "Bonds") securing payment of the verdicts or judgments held by the Bonded Claimants; and (2) the Bonded Claimants. The Bonded Claimants hold verdicts or judgments pending appeal in various state and federal jurisdictions. The Debtors requested that the Sureties issue the Bonds to stay execution by the Bonded Claimants of compensatory and, in some instances, punitive damage awards pending final resolution of the appeals. On the Petition Date, approximately 140,000 Bodily Injury Claimants had actions pending against the Debtors.

The Sureties

11. To varying extents, each bond is secured by collateral transferred by the Debtors, either in the form of cash or cash equivalents, or in the form of pledged future insurance proceeds. Each Surety that issued Bonds to stay execution of the judgments held by the Bonded Claimants, named below in paragraphs 12 through 18, is a defendant in this proceeding.

12. Defendant Allstate Insurance Company ("Allstate") is a corporation organized under the laws of Illinois, with its

principal place of business at Allstate Plaza, Northbrook, Illinois. Northbrook Property and Casualty Insurance Company, formerly known as Northbrook Insurance Company ("Northbrook"), was an affiliate of Allstate and has recently merged into Allstate.

13. Defendant California Union Insurance Company ("California Union") is a corporation organized under the laws of California, with its principal place of business at Philadelphia, Pennsylvania.

14. Defendant Insurance Company of North America ("INA"), an affiliate of California Union, is a corporation organized under the laws of Pennsylvania, with its principal place of business at Philadelphia, Pennsylvania. California Union is a wholly owned subsidiary of Indemnity Insurance Company of North America, which in turn is a wholly owned subsidiary of INA.

15. Defendant Home Insurance Company ("Home") is a corporation organized under the laws of New Hampshire, with its principal place of business at New York, New York.

16. Defendant Home Indemnity Company ("Home Indemnity"), an affiliate of Home, is a corporation organized under the laws of New Hampshire, with its principal place of business at Manchester, New Hampshire.

17. Defendant National Union Fire Insurance Company of Pittsburgh, PA ("National Union"), is a corporation organized under the laws of Pennsylvania, with its principal place of business at New York, New York.

18. Defendant Aetna Insurance Company ("Aetna") is a corporation organized under the laws of Connecticut, with its principal place of business at Hartford, Connecticut.

19. California Union, INA, Northbrook, Allstate, Home Insurance, Home Indemnity, Aetna and National Union are sometimes collectively referred to as the "Sureties."

**Bonded Claimants Receiving Transfers
On or Within 90 Days of Petition Date**

20. The defendants named below in paragraphs 21 through 56 were the beneficiaries of transfers of the Debtors' property through issuance of Bonds on or within 90 days of the Petition Date. These defendants are sometimes collectively referred to as the "Preference Defendants."

21. Defendant Larry Baker ("Baker") was awarded a judgment (the "Baker Judgment") on August 6, 1990, in the District Court of Boulder, Colorado in the amount of \$941,773.84 (including \$28,313.84 in costs) as compensatory damages for asbestos-related injuries. Celotex appealed the Baker Judgment to the Colorado Court of Appeals. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on October 9, 1990, in the amount of \$1,460,963.73 (the "Baker Bond"). As collateral for the issuance of the Baker Bond, on October 9, 1990, the Debtors transferred to National Union, for the indirect benefit of Baker, a security interest in the Debtors' cash previously transferred by the Debtors to the AIG Liquid Assets Pool Account specifically described in paragraph 175 herein.

On June 25, 1991, Baker filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 23, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

22. Defendant Doris Ulrich ("Ulrich"), individually and as Executrix of the Estate of Richard Ulrich, was awarded a judgment (the "Ulrich Judgment"), on July 13, 1990, in the Superior Court of New Jersey Law Division, Middlesex County, in the amount of \$146,488.10 (including a pre-judgment interest of \$19,638.10) as compensatory damages for asbestos-related injuries. Celotex appealed the Ulrich Judgment to the Superior Court of New Jersey, Appellate Division. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on October 9, 1990, in the amount of \$316,828.12 (the "Ulrich Bond"). As collateral for the issuance of the Ulrich Bond, on October 9, 1990, the Debtors transferred to National Union, for the indirect benefit of Ulrich, a security interest in the Debtors' cash previously transferred by the Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

23. Defendant Harold Washington ("Washington") was awarded a judgment (the "Washington Judgment"), on August 3, 1990, in the District Court of Boulder, Colorado in the amount of \$427,417.95 (including \$6,417.95 in costs) as compensatory damages for asbestos-related injuries. Celotex appealed the Washington Judgment to the Colorado Court of Appeals. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on October 9, 1990, in the amount of \$662,014.89 (the "Washington Bond"). As collateral for the issuance of the Washington Bond, on October 9, 1990, the Debtors transferred to National Union, for the indirect benefit of Washington, a security interest in the Debtors' cash previously transferred by the Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On June 25, 1991, Washington filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 23, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited

purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

24. Defendant Marlene Bowers ("Bowers") Personal Representative for Richard E. Williams, deceased, was awarded a judgment (the "Bowers Judgment"), on September 22, 1989, in the Superior Court of Washington for Kitsap County against Celotex and two other defendants in the amount of \$189,198.89 as compensatory damages for asbestos-related injuries. Celotex' share of the judgment was \$63,066.30. Celotex appealed the Bowers Judgment to the Superior Court of Appeals of the State of Washington. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on October 4, 1990, in the amount of \$258,520.18 (the "Bowers Bond"). Allstate acted as surety on Bowers Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Bowers Bond, on October 4, 1990, the Debtors transferred to Allstate, for the indirect benefit of Bowers, property of the Debtors having a value of \$258,520.18. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

25. Defendant American Marine Bank as Personal Representative for Elbert Eldredge, deceased ("Eldredge"), was awarded a judgment (the "Eldredge Judgment"), on September 22, 1989, in the Superior Court of Washington for Kitsap County against Celotex and two other defendants in the amount of \$260,311.61 as compensatory damages for asbestos-related injuries. Celotex' share of the judgment was \$86,770.54. Celotex appealed the Eldredge Judgment to the Court of Appeals of the State of Washington. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on October 4, 1990, in the amount of \$355,681.07 (the "Eldredge

Bond"). Allstate acted as surety on Eldredge Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Eldredge Bond, on October 4, 1992, the Debtors transferred to Allstate, for the indirect benefit of Eldredge, property of the Debtors having a value of \$355,681.07. The Debtors' property that was transferred was in the form of assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

26. Defendant Hilda Yvonne McElhaney ("McElhaney"), as Personal Representative of Lawrence Edward McElhaney, deceased, was awarded a judgment (the "McElhaney Judgment"), on September 6, 1990, in the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida in the amount of \$182,837.90 as compensatory damages for asbestos-related injuries. Celotex and Carey Canada appealed the McElhaney Judgment to the First District Court of Appeal, State of Florida. To stay execution pending appeal, Celotex and Carey Canada, as principals, and National Union, as surety, issued a bond on October 2, 1990, in the amount of \$226,719.00 (the "McElhaney Bond"). As collateral for the issuance of the McElhaney Bond, on October 2, 1990, the Debtors transferred to National Union, for the indirect benefit of McElhaney, a security interest in the Debtors' cash previously transferred by the Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

27. Defendant Pearl Newland ("Newland"), as Personal Representative of James M. Newland, deceased, was awarded a judgment (the "Newland Judgment"), on September 6, 1990, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, in the amount of \$313,643.42 as compensatory damages for asbestos-related injuries. Celotex and Carey Canada appealed the Newland Judgment to the First District Court of Appeal, State of Florida. To stay execution pending appeal,

Celotex and Carey Canada, as principals, and Allstate, as surety, issued a bond on October 2, 1990, in the amount of \$388,917.74 (the "Newland Bond"). Allstate acted as surety on the Newland Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Newland Bond, on October 2, 1990, the Debtors transferred to Allstate, for the indirect benefit of Bowers, property of the Debtors having a value of \$388,917.74. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

28. Defendant Eunice L. Sego ("Sego") as Personal Representative of James A. Sego, deceased, was awarded a judgment (the "Sego Judgment"), on September 6, 1990, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida in the amount of \$249,525.86 as compensatory damages for asbestos-related injuries. Celotex and Carey Canada appealed the Sego Judgment to the First District Court of Appeal, State of Florida. To stay execution pending appeal, Celotex and Carey Canada, as principals, and Allstate, as surety, issued a bond on October 2, 1990, in the amount of \$309,412.00 (the "Sego Bond"). Allstate acted as surety on the Sego Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Sego Bond, on October 2, 1990, the Debtors transferred to Allstate, for the indirect benefit of Sego, property of the Debtors having a value of \$309,412.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

[29.] Defendant Walter Stedeford ("Stedeford") as Personal Representative of Norman Hicks, deceased, was awarded

a judgment (the "Stedeford Judgment"), on September 6, 1990, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida in the amount of \$261,818.94 as compensatory damages for asbestos-related injuries. Celotex and Carey Canada appealed the Stedeford Judgment to the First District Court of Appeal, State of Florida. To stay execution pending appeal, Celotex and Carey Canada, as principals, and Allstate, as surety, issued a bond on October 2, 1990, in the amount of \$162,327.00 (the "Stedeford Bond"). Allstate acted as surety on the Stedeford Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Stedeford Bond, on October 2, 1990, the Debtors transferred to Allstate, for the indirect benefit of Stedeford, property of the Debtors having a value of \$162,327.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

30. Defendant Walter Bowen ("Bowen") was awarded a judgment (the "Bowen Judgment"), on February 2, 1990, in the Circuit Court of Monongalia County, West Virginia against Celotex and one other defendant in the amount of \$91,950.00 as compensatory damages for asbestos-related injuries. Celotex' share of the judgment was \$44,625.00. Celotex petitioned to appeal the Bowen Judgment to the Supreme Court of Appeals of West Virginia. To stay execution pending appeal, Celotex, as principal, and INA, as surety, issued a bond on September 28, 1990, in the amount of \$50,475.00 (the "Bowen Bond"). INA acted as surety on the Bowen Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Bowen Bond, on September 28, 1990, the Debtors transferred to California Union, for the indirect benefit of Bowen, property of the Debtors having a value of \$50,475.00. The Debtors' property that was transferred was

in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

On July 11, 1991, Bowen filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On August 14, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The Supreme Court of Appeals of West Virginia has denied Celotex' petition for appeal.

31. Defendant Robert Bowling ("Bowling") was awarded a judgment (the "Bowling Judgment"), on February 2, 1990, in the Circuit Court of Monongalia County, West Virginia against Celotex and one other defendant in the amount of \$92,500.00 as compensatory damages for asbestos-related injuries. Celotex' share of the judgment was \$44,750.00. Celotex petitioned to appeal the Bowling Judgment to the Supreme Court of Appeals of West Virginia. To stay execution pending appeal, Celotex, as principal, and INA, as surety, issued a Bond on September 28, 1990 in the amount of \$50,750.00 (the "Bowling Bond"). INA acted as surety on the Bowling Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Bowling Bond, on September 28, 1990, the Debtors transferred to California Union, for the indirect benefit of Bowling, property of the Debtors having a value of \$50,750.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

On July 11, 1991, Bowling filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On August 14, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The Supreme Court of Appeals of West Virginia was denied Celotex' petition for appeal.

32. Defendant Robert E. Funk ("Funk") was awarded a judgment (the "Funk Judgment"), on June 18, 1990, in the District Court of Harris County, Texas, 61st Judicial District against Celotex and one other defendant in the amount of \$60,659.39 (including pre-judgment interest of \$6,319.39) as compensatory damages for asbestos-related injuries. Celotex' share of the judgment was \$30,329.70. Celotex appealed the Funk Judgment to the Court of Appeals, 1st or 14th Judicial District of Texas, Houston. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on September 11, 1990, in the amount of \$75,061.60 (the "Funk Bond"). Allstate acted as surety on the Funk Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Funk Bond, on September 11, 1990, the Debtors transferred to Funk, for the indirect benefit of Bowers, property of the Debtors having a value of \$75,061.60. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

33. Defendant Dan M. Thompson ("Thompson") was awarded a judgment (the "Thompson Judgment"), on June 18, 1990, in the District Court of Harris County, Texas 61st Judicial District against Celotex and one other defendant in the amount of \$238,578.36 (including pre-judgment interest of \$46,078.36)

as compensatory damages for asbestos-related injuries. Celotex' share of the judgment was \$95,431.34. Celotex appealed the Thompson Judgment to the Court of Appeals, 1st or 14th Judicial District of Texas, Houston. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on September 11, 1990, in the amount of \$280,558.01 (the "Thompson Bond"). Allstate acted as surety on the Thompson Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Thompson Bond, on September 11, 1990, the Debtors transferred to Allstate, for the indirect benefit of Thompson, property of the Debtors having a value of \$280,558.01. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

34. Defendants Suzan Rohrbaugh, Barbara Ann Clay, and Debra Mae Ambler, individually and as the Personal Representatives of the Estate of Dorothy Mae Palmer (collectively "Rohrbaugh"), were awarded a judgment (the "Rohrbaugh Judgment") on July 19, 1990, in the United States District Court for the Northern District of Oklahoma against Celotex and one other defendant in the amount of \$193,531.00 as compensatory damages for asbestos-related injuries. Celotex' share of the judgment was \$96,765.50. Celotex appealed the Rohrbaugh Judgment to the United States Court of Appeals, Tenth Circuit. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on September 9, 1990, in the amount of \$351,424.00 (the "Rohrbaugh Bond"). Allstate acted as surety on the Rohrbaugh Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Rohrbaugh Bond, on September 9, 1990, the Debtors transferred to Allstate, for the indirect benefit of Rohrbaugh, property of the Debtors having a value of

\$351,424.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

On January 22, 1991, Rohrbaugh filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On March 21, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. On May 26, 1992 the judgment was vacated and remanded for further proceedings.

35. Defendant Frances Louise Rickey ("Rickey") was awarded a judgment (the "Rickey Judgment") on July 12, 1990, in the United States District Court, Western District of Missouri, Western Division in the amount of \$126,975.13 as compensatory damages for asbestos-related injuries. Celotex appealed the Rickey Judgment to the United States Court of Appeals for the Eighth Circuit. To stay execution pending appeal, Celotex, as principal, and Home indemnity, as surety, issued a bond on September 7, 1990, in the amount of \$153,765.30 (the "Rickey Bond"). Home Indemnity acted as surety on the Rickey Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Rickey Bond, on September 7, 1990, the Debtors transferred to Home, for the indirect benefit of Rickey, property of the Debtors having a value of \$153,765.30. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

On February 12, 1992, Rickey filed with this Court a motion for relief from stay seeking the entry of an order requiring the commencement of the appellate process. On March 19, 1991, this Court entered its Order Denying Motion of Mrs. Frances L. Rickey to Modify the §362 Stay. The appellate process has not been commenced and, accordingly, has not been concluded.

36. Defendant Emma Powell ("Powell") individually and as Executrix of the Estate of Henry Powell, deceased, was awarded a judgment (the "Powell Judgment") on August 10, 1990, in the Superior Court of New Jersey, Law Division, Camden County against Celotex, Carey Canada and one other defendant in the amount of \$850,068.72 (including \$297,869.72, in pre-judgment interest) as compensatory damages for asbestos-related injuries. Celotex' and Carey Canada's shares of the compensatory damages were \$449,071.06 and \$299,002.96, respectively. Celotex and Carey Canada appealed the Powell Judgment to the Superior Court of New Jersey, Appellate Division. To stay execution pending appeal, Celotex and Carey Canada as principals, and INA, as surety, issued a bond on August 27, 1990, in the amount of \$850,068.72 (the "Powell Bond"). INA acted as surety on the Powell Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Powell Bond, on August 27, 1990, the Debtors transferred to California Union, for the indirect benefit of Powell, property of the Debtors having a value of \$850,068.72. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

On May 23, 1991, Powell filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 24, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

37. Powell was awarded an additional judgment against Celotex on August 10, 1990 in the Superior Court of New Jersey, Law Division, Camden County in the amount of \$856,000.00 as punitive damages for asbestos-related injuries. Celotex appealed this judgment to the Superior Court of New Jersey, Appellate Division. To stay execution pending appeal, Celotex, as principal, and INA as surety, issued a bond on August 27, 1990, in the amount of \$856,000.00 (the "Powell Bond"). INA acted as surety on the Powell Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Powell Bond, on August 27, 1990, the Debtors transferred to California Union, for the indirect benefit of Powell, property of the Debtors having a value of \$856,000.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

On May 23, 1991, Powell filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 24, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

38. Defendants Francis Maguire and Elizabeth Maguire (the "Maguires") were awarded a judgment (the "Maguire Judgment"), on August 10, 1990, in the Superior Court of New Jersey Law Division, Camden County against Celotex, Carey Canada and one other defendant in the amount of \$301,500.00 as compensatory damages for asbestos-related injuries. Celotex' and Carey Canada's shares of the compensatory damages were \$100,500.00 each. Celotex and Carey Canada appealed the Maguire Judgment to the Superior Court of New Jersey, Appellate Division. To stay execution pending appeal, Celotex and Carey Canada, as principals, and Allstate, as surety, issued a bond on August 25, 1990, in the amount of \$449,284.00 (the "Maguire Bond"). Allstate acted as surety on the Maguire Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Maguire Bond, on August 25, 1990, the Debtors transferred to Allstate, for the indirect benefit of the Maguires, property of the Debtors having a value of \$449,284.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

On May 3, 1991, the Maguires filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On August 1, 1991, this Court entered its Amended Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

39. Defendant Daniel Rawski ("Rawski") was awarded a judgment (the "Rawski Judgment") on August 9, 1990, in the Supreme Court of the State of New York, in and for Erie County in the amount of \$362,000.00 against Celotex and one other defendant, as compensatory damages (and \$50,000.00 as punitive damages against Celotex) for asbestos-related injuries. Celotex' share of the compensatory judgment was \$271,500.00. Celotex appealed the Rawski Judgment to the State of New York, Supreme Court Appellate Division, Fourth Judicial Department. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on August 22, 1990, in the amount of \$450,000.00 (the "Rawski Bond"). Home Indemnity acted as surety on the Rawski Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Rawski Bond, on August 22, 1990, the Debtors transferred to Home, for the indirect benefit of Rawski, property of the Debtors having a value of \$450,000.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

On April 18, 1991, Rawski filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 17, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

40. Defendants Richard J. Weber and Rose Marie Weber (the "Webers") were awarded a judgment (the "Weber Judgment") on June 27, 1990, in the United States District Court for the Western District of Pennsylvania in the amount of \$9,450.00 as compensatory damages for asbestos-related injuries. Celotex

appealed the Weber Judgment to the United States Court of Appeals, Third Circuit. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on August 22, 1990, in the amount of \$9,450.00 (the "Weber Bond"). Home Indemnity acted as surety on Weber Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Weber Bond, on August 22, 1990, the Debtors transferred to Home, for the indirect benefit of the Webers, property of the Debtors having a value of \$9,450.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

41. Defendants Stanley Boody and Anna Boody (the "Boodys") were awarded a judgment (the "Boody Judgment"), on July 27, 1990, in the Superior Court of New Jersey, Law Division, Camden County against Celotex, Carey Canada and one other defendant in the amount of \$459,190.76 (including \$84,190.76 in pre-judgment interest) as compensatory damages for asbestos-related injuries. Celotex's share of the judgment was \$140,082.88. Celotex appealed the Boody Judgment to the Superior Court of New Jersey, Appellate Division. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on August 21, 1990, in the amount of \$229,595.38 (the "Boody Celotex Bond"). Allstate acted as surety on the Boody Celotex Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Boody Celotex Bond, on August 21, 1990, the Debtors transferred to Allstate, for the indirect benefit of the Boodys, property of the Debtors having a value of \$229,595.58. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

On May 23, 1991, the Boodys filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 23, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

42. Carey Canada's share of the Boody Judgment was \$140,082.88. Carey Canada appealed the Boody Judgment to the Superior Court of New Jersey, Appellate Division. To stay execution pending appeal, Carey Canada, as principal, and Allstate, as surety, issued a bond on August 21, 1990, in the amount of \$229,595.38 (the "Boody Carey Canada Bond"). Allstate acted as surety on the Boody Carey Canada Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Boody Carey Canada Bond, on August 21, 1990, the Debtors transferred to Allstate, for the indirect benefit of the Boodys, property of the Debtors having a value of \$229,595.38. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

On May 23, 1991, the Boodys filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 23, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

43. Defendants Harold Adams, Stanley Ball, William Beeks, Crockett Brewster, Hastings Campbell, Ronald Cox, George Farmer, George Foster and Ned Staton (the "Adams Group") have actions pending against Celotex before the Circuit Court for Baltimore City, Maryland seeking damages for asbestos-related injuries. As required by the Court, prior to the entry of judgments, Celotex, as principal, and INA, as surety, issued a bond on August 17, 1990, in the amount of \$3,000,000 (the "Adams Group Bond"). INA acted as surety on the Adams Group Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Adams Group Bond, on August 17, 1990, the Debtors transferred to California Union, for the indirect benefit of the Adams Group, property of the Debtors having a value of \$3,000,000. The Debtors property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein. Judgment was not entered prior to the petition date and, accordingly, was never entered against Celotex.

44. Defendant Harless Boone ("Boone") was awarded a judgment (the "Boone Judgment") on February 2, 1990, in the Circuit Court of Monongalia County, West Virginia in the amount of \$104,000.00 as compensatory damages for asbestos-related injuries. Celotex petitioned to appeal the Boone Judgment to the Supreme Court of Appeals of West Virginia. To stay execution pending appeal, Celotex, as principal, and INA, as surety, issued a bond on August 8, 1990, in the amount of \$115,200.00 (the "Boone Bond"). INA acted as surety on the Boone Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Boone Bond, on August 8, 1990, the Debtors transferred to California Union, for the indirect benefit of Boone, property of the Debtors having a value of \$115,200.00. The Debtors'

property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

On July 11, 1991, Boone filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On August 14, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The Supreme Court of Appeals of West Virginia has denied Celotex' petition for appeal.

45. Defendant Robert Davis was awarded a judgment (the "Robert Davis Judgment"), on February 2, 1990, in the Circuit Court of Monongalia County, West Virginia in the amount of \$86,850.00 as compensatory damages for asbestos-related injuries. Celotex petitioned to appeal the Robert Davis Judgment to the Supreme Court of Appeals of West Virginia. To stay execution pending appeal, Celotex, as principal, and INA, as surety, issued a bond on August 8, 1990, in the amount of \$98,850.00 (the "Robert Davis Bond"). INA acted as surety on the Robert Davis Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Robert Davis Bond, on August 8, 1990, the Debtors transferred to California Union, for the indirect benefit of Robert Davis, property of the Debtors having a value of \$98,850.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

On July 11, 1991, Robert Davis filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On August 14, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The Supreme Court of Appeals of West Virginia has denied Celotex' petition for appeal.

46. Defendant Ronald Davis as Executor of the Estate of Jennings Davis, deceased, was awarded a judgment (the "Ronald Davis Judgment") on February 2, 1990, in the Circuit Court of Monongalia County, West Virginia in the amount of \$40,000.00 as punitive damages for asbestos-related injuries. Celotex petitioned to appeal the Ronald Davis Judgment to the Supreme Court of Appeals of West Virginia. To stay execution pending appeal, Celotex, as principal, and INA, as surety, issued a bond on August 8, 1990, in the amount of \$44,000.00 (the "Ronald Davis Bond"). INA acted as surety on the Ronald Davis Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Ronald Davis Bond, on August 8, 1990, the Debtors transferred to California Union, for the indirect benefit of Ronald Davis, property of the Debtors having a value of \$44,000.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

On July 11, 1991, Ronald Davis filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On August 14, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including

the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

47. Defendant James Leonard Teague ("Teague") was awarded a judgment (the "Teague Judgment") on February 2, 1990, in the Circuit Court of Monongalia County, West Virginia in the amount of \$65,500.00 as compensatory damages for asbestos-related injuries. Celotex petitioned to appeal the Teague Judgment to the Supreme Court of Appeals of West Virginia. To stay execution pending appeal, Celotex, as principal, and INA, as surety, issued a bond on August 8, 1990, in the amount of \$76,000.00 (the "Teague Bond"). INA acted as surety on the Teague Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Teague Bond, on August 8, 1990, the Debtors transferred to California Union, for the indirect benefit of Teague, property of the Debtors having a value of \$76,000.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

On July 11, 1991, Teague filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On August 14, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The Supreme Court of Appeals of West Virginia has denied Celotex' petition for appeal.

48. Defendants John Wilson, Sr., Alton Coney, Edward Kline, Pauline Kline and Charles Watts (the "Wilson Group") were awarded a judgment (the "Wilson Group Judgment") as Wilson, et al., on January 10, 1990, in the Superior Court of the

State of Delaware in and for New Castle County as follows: Wilson, \$323,750.00; Coney, \$16,458.56; E. Kline, \$64,000.00; P. Kline, \$153,900.00 and Watts, \$14,926.56, for a total of \$573,035.12 as compensatory damages for asbestos-related injuries. Celotex appealed the Wilson Group Judgment to the Supreme Court of the State of Delaware. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on August 7, 1990, in the amount of \$573,035.12 (the "Wilson Group Bond"). Allstate acted as surety on the Wilson Group Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Wilson Group Bond, on August 7, 1990, the Debtors transferred to Allstate, for the indirect benefit of the Wilson Group, property of the Debtors having a value of \$573,035.12. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

On September 19, 1991, the Wilson Group filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On October 24, 1991, this Court entered into its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgments affirmed.

49. Defendant Gertrude P. Caya ("Caya"), as Personal Representative of the Estate of William F. Caya, deceased, was awarded a judgment (the "Caya Judgment"), on July 20, 1990, in the United States District Court for the District of Oregon in the amount of \$27,477.24 (including \$8,115.24 in fees and costs) as compensatory damages for asbestos-related injuries. Celotex appealed the Caya Judgment to the United States Court of

Appeals for the Ninth Circuit. To stay execution pending appeal, Celotex, as principal, and INA, as surety, issued a bond on August 2, 1990, in the amount of \$31,922.49 (the "Caya Bond"). INA acted as surety on the Caya Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Caya Bond, on August 2, 1990, the Debtors transferred to California Union, for the indirect benefit of Caya, property of the Debtors having a value of \$31,922.49. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

50. Defendant George Gula ("Gula") as Personal Representative of the Estate of Dorothy Gula was awarded a judgment (the "Gula Judgment"), on July 20, 1990, in the United States District Court for the District of Oregon in the amount of \$8,127.44 for fees and costs incurred in this action, which alleged asbestos-related injuries. Celotex appealed the Gula Judgment to the United States Court of Appeals for the Ninth Circuit. To stay execution pending appeal, Celotex, as principal, and INA, as surety, issued a bond on August 2, 1990, in the amount of \$9,381.84 (the "Gula Bond"). INA acted as surety on the Gula Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Gula Bond, on August 2, 1990, the Debtors transferred to California Union, for the indirect benefit of Gula, property of the Debtors having a value of \$9,381.44. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

51. Defendant Arlene Loeffler ("Loeffler") as Personal Representative of the Estate of Dale L. Loeffler, was awarded a judgment (the "Loeffler Judgment"), on July 20, 1990, in the United States District Court for the District of Oregon in the amount of \$8,226.20 for fees and costs incurred in this action, which alleged asbestos-related injuries. Celotex appealed the Loeffler Judgment to the United States Court of Appeals for the Ninth Circuit. To stay execution pending appeal, Celotex, as principal, and INA, as surety, issued a bond on August 2, 1990, in the amount of \$9,480.60 (the "Loeffler Bond"). INA acted as surety on the Loeffler Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Loeffler Bond, on August 2, 1990, the Debtors transferred to California Union, for the indirect benefit of Loeffler, property of the Debtors having a value of \$9,480.60. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

52. Defendant Irene McCoy ("McCoy") as Personal Representative of the Estate of Robert W. McCoy, was awarded a judgment (the "McCoy Judgment"), on July 20, 1990, in the United States District Court for the District of Oregon in the amount of \$38,041.24 (including \$8,095.24 in fees and costs) as compensatory damages for asbestos-related injuries. Celotex appealed the McCoy Judgment to the United States Court of Appeals for the Ninth Circuit. To stay execution pending appeal, Celotex, as principal, and INA, as surety, issued a bond on August 2, 1990, in the amount of \$44,230.74 (the "McCoy Bond"). INA acted as surety on the McCoy Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the McCoy Bond, on August 2, 1990, the Debtors transferred to California Union, for the indirect benefit of McCoy, property of the Debtors having

a value of \$44,230.74. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

53. Defendant Dorothy L. Phillips ("Phillips") as Personal Representative of the Estate of Clester F. Phillips, was awarded a judgment (the "Phillips Judgment"), on July 20, 1990, in the United States District Court for the District of Oregon in the amount of \$8,127.88 for fees and costs incurred in this action, which alleged asbestos-related injuries. Celotex appealed the Phillips Judgment to the United States Court of Appeals for the Ninth Circuit. To stay execution pending appeal, Celotex, as principal, and INA, as surety, issued a bond on August 2, 1990, in the amount of \$9,382.27 (the "Phillips Bond"). INA acted as surety on the Phillips Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Phillips Bond, on August 2, the Debtors transferred to California Union, for the indirect benefit of Phillips, property of the Debtors having a value of \$9,382.27. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

54. Defendants Harry A. Wingate and Cecilia Wingate (the "Wingates") were awarded a judgment (the "Wingate Judgment"), on July 20, 1990, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida in the amount of \$212,802.22 against Carey Canada as compensatory damages (and \$89,000.00 as punitive damages) for asbestos-related injuries. Carey Canada appealed the Wingate Judgment to the First District Court of Appeal, State of Florida. To stay execution pending appeal, Carey Canada, as principal, and INA, as surety, issued a bond on July 26, 1990, in the amount of \$374,234.75

(the "Wingate Carey Canada Bond"). INA acted as surety on the Wingate Carey Canada Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Wingate Carey Canada Bond, on July 26, 1990, the Debtors transferred to California Union, for the indirect benefit of the Wingates, property of the Debtors having a value of \$374,234.75. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

55. The Wingates were awarded an additional judgment on July 20, 1990, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida in the amount of \$463,157.78 against Celotex as compensatory damages (and \$193,000.00 as punitive damages) for asbestos-related injuries. Celotex appealed this judgment to the First District Court of Appeal, State of Florida. To stay execution pending appeal, Celotex, as principal, and INA, as surety, issued a bond on July 26, 1990, in the amount of \$813,635.65 (the "Wingate Celotex Bond"). INA acted as surety on the Wingate Celotex Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraph 171-172 herein. As collateral for the issuance of the Wingate Celotex Bond, on July 26, 1990, the Debtors transferred to California Union, for the indirect benefit of the Wingates, property of the Debtors having a value of \$813,635.65. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

56. Defendants Viold Moeckel and Evangeline Moeckel (the "Moeckels") were awarded a judgment (the "Moeckel Judgment"), on July 2, 1990, from the Circuit Court, Eleventh

Judicial Circuit, in and for Dade County, Florida in the amount of \$235,250.00 as compensatory damages for asbestos-related injuries. Celotex appealed the Moeckel Judgment to the Third District Court of Appeals. To stay execution pending appeal, Celotex, as principal, and INA, as surety, issued a bond on July 24, 1990, in the amount of \$291,710.00 (the "Moeckel Bond"). INA acted as surety on the Moeckel Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Moeckel Bond, on July 24, 1990, the Debtors transferred to California Union, for the indirect benefit of the Moeckels, property of the Debtors having a value of \$291,710.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

On December 11, 1990, the Moeckels filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On February 11, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgment affirmed.

Bonded Claimants Receiving Transfers Outside 90 Days and Within One Year of Petition Date

57. The defendants named below in paragraphs 58 through 117 were the beneficiaries of transfers of the Debtors' property through issuance of Bonds outside 90 days and within one year of the Petition Date. These defendants are sometimes collectively referred to as the "One Year Defendants."

58. Defendants Lawrence J. Falck, Jr. and Betty Lou Falck (the "Falcks") were awarded a judgment (the "Falck Judgment") on January 29, 1990 and June 12, 1990, in the United States District Court for the Western District of Pennsylvania against Celotex and three other defendants in the amounts of \$10,000.00 as compensatory damages for asbestos-related injuries, and \$3,469.90 as delay damages (prejudgment interest). Celotex' share of the judgments was \$3,681.63. Celotex appealed the Falck Judgment to the United States Court of Appeals for the Third Circuit. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on June 30, 1990, in the amount of \$3,682.00 (the "Falck Bond"). As collateral for the issuance of the Falck Bond, on June 30, 1990, the Debtors transferred to National Union, for the indirect benefit of the Falcks, a security interest in the Debtors' cash previously transferred by the Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

59. Defendant Frank J. Coughlin ("Coughlin") was awarded a judgment (the "Coughlin Judgment") on June 1, 1990, in the Superior Court of the State of California, County of Alameda against Celotex and one other defendant in the amount of \$891,359.00, as compensatory damages for asbestos-related injuries. Celotex appealed the Coughlin Judgment to the Court of Appeals. Celotex' share, which is an issue on appeal, is not more than \$445,679.50. To stay execution pending appeal, Celotex, as principal, and INA, as surety, issued a bond on June 21, 1990, in the amount of \$1,337,038.50 (the "Coughlin Bond"). INA acted as surety on the Coughlin Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Coughlin Bond, on June 21, 1990, the Debtors transferred to California Union, for the indirect benefit of Coughlin, property of the Debtors having a value of \$1,337,038.50. The Debtors' property that was transferred was in the form of an assignment of certain future

insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

On March 19, 1991, Coughlin filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On April 16, 1991, this Court entered its Order Regarding Relief From Stay modifying the \$362 Stay and the \$105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

60. Defendant John Costello ("Costello"), Executor of the estate of Martin Costello, deceased, was awarded a judgment (the "Costello Judgment") on May 21, 1990, in the Court of Common Pleas, Philadelphia County, in the amount of \$59,500.00, as compensatory damages for asbestos-related injuries, and \$51,931.60 as delay damages (pre-judgment interest). Celotex appealed the Costello Judgment to the Supreme Court of Pennsylvania. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on June 14, 1990 in the amount of \$133,717.92 (the "Costello Bond"). As collateral for the issuance of the Costello Bond, on June 14, 1990, the Debtors transferred to National Union, for the indirect benefit of Costello, a security interest in the Debtors' cash previously transferred by the Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

61. Defendants Ronnie Trent and Susan Trent (the "Trents") were awarded a judgment (the "Trent Judgment"), on March 16, 1990, in the District Court of 160th Judicial District, Dallas County, Texas, in the amount of \$122,000.00, as compensatory damages against Celotex and one other defendant (and \$25,000.00 as punitive damages against Celotex) for asbestos-related injuries. Celotex' share of the compensatory judgment

was \$61,000.00. Celotex appealed the Trent Judgment to the Court of Civil Appeals, Sixth Supreme Judicial District of Texas. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on June 9, 1990 in the amount of \$175,300.00 (the "Trent Bond"). As collateral for the issuance of the Trent Bond, on June 9, 1990, the Debtors transferred to National Union, for the indirect benefit of the Trents, a security interest in the Debtors' cash previously transferred by the Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On May 10, 1991, the Trents filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 17, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

62. Defendants Gordon L. House and Gladys House (the "Houses") were awarded a judgment (the "House Judgment"), on May 17, 1990, in the District Court in and for Escambia County, Florida in the amount of \$74,300.00, as compensatory damages (and \$400,000.00 as punitive damages) for asbestos-related injuries. Celotex appealed the House Judgment to the Florida First District Court of Appeals. To stay execution pending appeal, Celotex, as principal, and INA, as surety, issued a bond on June 8, 1990 in the amount of \$588,132.00 (the "House Bond"). INA acted as surety on the House Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the House Bond, on June 8, 1990, the Debtors transferred to California Union, for the indirect benefit of the Houses, property of the Debtors having a value of \$588,132.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds

to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

On February 5, 1991, the Houses filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On March 5, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgment affirmed.

63. Defendant Mary Kreppein ("Kreppein") for Gustave Kreppein, deceased, was awarded a judgment (the "Kreppein Judgment") on March 9, 1990, in the United States District Court, Eastern District of New York and Southern District of New York against Celotex and three other defendants in the amount of \$564,440.00 as compensatory damages for asbestos-related injuries. Celotex' share of the judgment was \$229,303.82. Celotex appealed the Kreppein Judgment to the United States Court of Appeals for the Second Circuit. To stay execution pending appeal, Celotex, as principal, and INA, as surety, issued a bond on June 4, 1990 in the amount of \$254,527.24 (the "Kreppein Bond"). INA acted as surety on the Kreppein Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Kreppein Bond, on June 4, 1990, the Debtors transferred to California Union, for the indirect benefit of Kreppein, property of the Debtors having a value of \$254,527.24. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

On September 13, 1991, Kreppin filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On October 24, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

64. Defendants David L. Carpenter and Doris Carpenter (the "Carpenters") were awarded a judgment (the "Carpenter Judgment") on May 18, 1989, in the United States District Court, Southern District of Ohio, Western Division, against Celotex, Carey Canada and one other defendant, in the amount of \$586,750.00, as compensatory damages for asbestos-related injuries. The portion of the compensatory award apportioned against Celotex was \$195,583.33, and against Carey Canada, \$195,583.33. Celotex and Carey Canada appealed the Carpenter Judgment to the United States Court of Appeals for the Sixth Circuit. To stay execution pending appeal, Celotex and Carey Canada, as principals, and INA, as surety, issued a bond on May 31, 1990 in the amount of \$400,202.62 (the "Carpenter Bond"). INA acted as surety on the Carpenter Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Carpenter Bond, on May 31, 1990, the Debtors transferred to California Union, for the indirect benefit of the Carpenters, property of the Debtors having a value of \$400,202.62. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

65. Defendants William L. Taylor and Edith Taylor (the "Taylors") were awarded a judgment (the "Taylor Judgment") on May 18, 1989, in the United States District Court, Southern

District of Ohio, Western Division, against Celotex, Carey Canada and one other defendant, in the amount of \$820,500.00, as compensatory damages for asbestos-related injuries. The portion of the compensatory award apportioned against Celotex was \$273,500.00, and against Carey Canada, \$273,500.00. Celotex and Carey Canada appealed the Taylor Judgment to the United States Court of Appeals for the Sixth Circuit. To stay execution pending appeal, Celotex and Carey Canada, as principals, and INA, as surety, issued a bond on May 31, 1990 in the amount of \$559,635.70 (the "Taylor Bond"). INA acted as surety on the Taylor Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Taylor Bond, on May 31, 1990, the Debtors transferred to California Union, for the indirect benefit of the Taylors, property of the Debtors having a value of \$559,635.70. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

66. Defendant Mary Gambacorta ("Gambacorta"), as Executrix of the Estate of Frank Gambacorta, deceased, was awarded a judgment (the "Gambacorta Judgment") on May 11, 1990 in the United States District Court, Northern District of New York, in the amount of \$1,071,808.67 (including \$77,482.00 pre-judgment interest) as compensatory damages for asbestos-related injuries. Celotex appealed the Gambacorta Judgment to the United States Court of Appeals for the Second Circuit. To stay execution pending appeal, Celotex, as principal, and INA, as surety, issued a bond on May 29, 1990 in the amount of \$1,189,957.62 (the "Gambacorta Bond"). INA acted as surety on the Gambacorta Bond pursuant to the California Union Agreement between the Debtors and California Union more specifically described in paragraphs 171-172 herein. As collateral for the issuance of the Gambacorta Bond, on May 29, 1990, the

Debtors transferred to California Union, for the indirect benefit of Gambacorta, property of the Debtors having a value of \$1,189,957.62. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the California Union Agreement more specifically described in paragraphs 171-172 herein.

On January 30, 1991, Gambacorta filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On March 19, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and judgment affirmed.

67. Defendant Julio Navarro ("Navarro") was awarded a judgment (the "Navarro Judgment") on April 24, 1990, in the Court of Common Pleas, First Judicial District of Pennsylvania, in the amount of \$6,666.67, as compensatory damages for asbestos-related injuries, and \$5,706.20 as delay damages (pre-judgment interest). Celotex appealed the Navarro Judgment to the Supreme Court of Pennsylvania. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on May 25, 1990 in the amount of \$14,847.44 (the "Navarro Bond"). As collateral for the issuance of the Navarro Bond, on May 25, 1990, the Debtors transferred to National Union, for the indirect benefit of Navarro, a security interest in the Debtors' cash previously transferred by the Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

68. Defendant Andrew Winder ("Winder") was awarded a judgment (the "Winder Judgment") on April 24, 1990, in the Court of Common Pleas, First Judicial District of Pennsylvania, Civil Trial Division, in the amount of \$6,666.67, as compensatory

damages for asbestos-related injuries, and \$4,901.00 as delay damages (pre-judgment interest). Celotex appealed the Winder Judgment to the Pennsylvania Appellate Court. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on behalf of Winder on May 25, 1990 in the amount of \$13,881.20 (the "Winder Bond"). As collateral for the issuance of the Winder Bond, on May 25, 1990, the Debtors transferred to National Union, for the indirect benefit of Winder, a security interest in cash previously transferred by the Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

69. Defendant Frank C. Foytik ("Foytik") was awarded a judgment (the "Foytik Judgment") on May 2, 1990, in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in the amount of \$583,500.00 as compensatory damages for asbestos-related injuries. Celotex appealed the Foytik Judgment to the District Court of Appeal, Third District of Florida. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on May 23, 1990 in the amount of \$723,540.00 (the "Foytik Bond"). Allstate acted as surety on the Foytik Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Foytik Bond, on May 23, 1990, the Debtors transferred to Allstate, for the indirect benefit of Foytik, property of the Debtors having a value of \$723,540.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

On December 11, 1990, Foytik filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On February 11, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for

the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and judgment affirmed.

70. Defendants Charles W. Hamilton and Elizabeth Hamilton (the "Hamiltons") were awarded a judgment (the "Hamilton Judgment") on May 11, 1990, in the United States District Court, Northern District of New York, in the amount of \$120,858.14, as compensatory damages for asbestos-related injuries. Celotex appealed the Hamilton Judgment to the United States Court of Appeals for the Second Circuit. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on May 23, 1990 in the amount of \$134,402.53 (the "Hamilton Bond"). Home Indemnity acted as surety on the Hamilton Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Hamilton Bond, on May 23, 1990, the Debtors transferred to Home, for the indirect benefit of the Hamiltons, property of the Debtors having a value of \$134,402.53. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

On January 30, 1991, the Hamiltons filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On March 19, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and judgment affirmed.

71. Defendant Nathaniel Bailey ("Bailey") was awarded a judgment (the "Bailey Judgment") on April 5, 1990, in the Court of Common Pleas, First Judicial District of Pennsylvania, Civil Trial Division, in the amount of \$9,375.00, as compensatory damages for asbestos-related injuries and \$7,065.15 as delay damages (pre-judgment interest). Celotex appealed the Bailey Judgment to the Pennsylvania Appellate Court. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on May 4, 1990 in the amount of \$19,728.18 (the "Bailey Bond"). Home Indemnity acted as surety on the Bailey Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Bailey Bond, on May 4, 1990, the Debtors transferred to Home, for the indirect benefit of Bailey, property of the Debtors having a value of \$19,728.18. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

72. Defendant Nan Swartz ("Swartz"), Executrix of the Estate of Irvin Swartz, and in her own right, was awarded a judgment (the "Swartz Judgment") on April 9, 1990, in the Court of Common Pleas, Philadelphia County, in the amount of \$7,500.00, as compensatory damages for asbestos-related injuries, as well as \$5,638.13 as delay damages (pre-judgment interest). Celotex appealed the Swartz Judgment to the Pennsylvania Appellate Court. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on May 4, 1990 in the amount of \$15,765.76 (the "Swartz Bond"). Home Indemnity acted as surety on the bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Swartz Bond, on May 4, 1990, the Debtors transferred to Home, for the indirect benefit of Swartz, property of the Debtors having a value of \$15,765.76. The Debtors' property that was transferred was in the form of an assignment

of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

73. Defendants Earl Wolf and Betty Wolf (the "Wolfs") were awarded a judgment (the "Wolf Judgment") on April 11, 1990, in the Supreme Court of the State of New York, Eighth Judicial District, in the amount of \$267,601.46 (including \$789.36 pre-judgment interest), as compensatory damages for asbestos-related injuries. Celotex appealed the Wolf Judgment to the Supreme Court of the State of New York, Appellate Division. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on April 23, 1990 in the amount of \$267,601.46 (the "Wolf Bond"). Home Indemnity acted as surety on the Wolf Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Wolf Bond, on April 23, 1990, the Debtors transferred to Home, for the indirect benefit of the Wolfs, property of the Debtors having a value of \$267,601.46. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

On April 1, 1991, the Wolfs filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 17, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

74. Defendant Kenneth O. Allen ("Allen") was awarded a judgment (the "Allen Judgment") on April 10, 1990, in the United States District Court for the Southern District of Alabama, Southern Division in the amount of \$50,000.00, as punitive damages for asbestos-related injuries. Celotex appealed the Allen Judgment to the United States Court of Appeals for the Eleventh Circuit. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on April 20, 1990 in the amount of \$50,000.00 (the "Allen Bond"). Home Indemnity acted as surety on the Allen Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Allen Bond, on April 20, 1990, the Debtors transferred to Home Indemnity, for the indirect benefit of Allen, property of the Debtors having a value of \$50,000.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

On May 10, 1991, Allen filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 23, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

75. Defendant Shirley Holtz ("Holtz") was awarded a judgment (the "Holtz Judgment") on January 19, 1990, in the Superior Court of the State of California, County of San Diego, in the amount of \$108,250.00 as compensatory damages for asbestos-related injuries. Celotex appealed the Holtz Judgment to the California Appellate Court. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on April 20, 1990 in the amount of \$162,375.00

(the "Holtz Bond"). Home Indemnity acted as surety on the Holtz Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Holtz Bond, on April 20, 1990, the Debtors transferred to Home, for the indirect benefit of Holtz, property of the Debtors having a value of \$162,375.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

76. Defendant George Theer ("Theer") was awarded a judgment (the "Theer Judgment") on April 9, 1990, in the Court of Common Pleas, Philadelphia County, in the amount of \$100,000.00, as compensatory damages for asbestos-related injuries, as well as \$54,966.67 as delay damages (pre-judgment interest). Celotex appealed the Theer Judgment to the Pennsylvania Appellate Court. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on April 20, 1990 in the amount of \$185,960.00 (the "Theer Bond"). Home Indemnity acted as surety on the Theer Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Theer Bond, on April 20, 1990, the Debtors transferred to Home, for the indirect benefit of Theer, property of the Debtors having a value of \$185,960.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

77. Defendants Thomas Bigelow and Phyllis Bigelow (the "Bigelows") were awarded a judgment (the "Bigelow Judgment") on April 4, 1990, in the Supreme Court of the State of New York, County of New York, in the amount of \$212,756.67 (including pre-judgment interest of \$7,690.00), as compensatory damages for asbestos-related injuries. Celotex appealed the

Bigelow Judgment to the Supreme Court of the State of New York, Appellate Division. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on April 13, 1990, in the amount of \$212,756.67 (the "Bigelow Bond"). Allstate acted as surety on the Bigelow Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Bigelow Bond, on April 13, 1990, the Debtors transferred to Allstate, for the indirect benefit of the Bigelows, property of the Debtors having a value of \$212,756.67. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

On March 27, 1991, the Bigelows filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 17, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

78. Defendant Pearl Glaser ("Glaser"), Executrix of the Estate of David Glaser, Deceased, and individually as the widow of David Glaser, was awarded a judgment (the "Glaser Judgment") on April 4, 1990, in the Supreme Court of the State of New York, County of New York, in the amount of \$606,678.12 (including pre-judgment interest of \$21,928.12), as compensatory damages for asbestos-related injuries. Celotex appealed the Glaser Judgment to the Supreme Court of the State of New York, Appellate Division. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on April 13, 1990, in the amount of \$606,678.12 (the "Glaser Bond"). Allstate acted as surety on the Glaser Bond pursuant to the

Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Glaser Bond, on April 13, 1990, the Debtors transferred to Allstate, for the indirect benefit of Glaser, property of the Debtors having a value of \$606,678.12. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

On March 27, 1991, Glaser filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 17, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

79. Defendant Anna Rattien ("Rattien"), Administratrix of the Estate of Julio Sanchez, deceased, was awarded a judgment (the "Rattien Judgment") on April 4, 1990, in the Supreme Court of the State of New York, County of New York, in the amount of \$974,731.25 (including pre-judgment interest of \$35,231.25), as compensatory damages for asbestos-related injuries. Celotex appealed the Rattien Judgment to the Supreme Court of the State of New York, Appellate Division. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on April 13, 1990, in the amount of \$974,731.25 (the "Rattien Bond"). Allstate acted as surety on the Rattien Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Rattien Bond, on April 13, 1990, the Debtors transferred to Allstate, for the indirect benefit of Rattien, property of the Debtors having a value of \$974,731.25. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds

to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

On March 27, 1991, Rattien filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 17, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

80. Defendants Charles Rose and Julia Rose (the "Roses") were awarded a judgment (the Rose Judgment") on April 4, 1990, in the Court of Common Pleas, Philadelphia County, in the amount of \$249,999.99, as compensatory damages for asbestos-related injuries, and \$209,427.08 as delay damages (pre-judgment interest). Celotex appealed the Rose Judgment to the Superior Court of Pennsylvania, Philadelphia Office. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on April 13, 1990, in the amount of \$551,312.48 (the "Rose Bond"). Allstate acted as surety on the Rose Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Rose Bond, on April 13, 1990, the Debtors transferred to Allstate, for the indirect benefit of the Roses, property of the Debtors having a value of \$551,312.48. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein. On June 12, 1990, Celotex' appeal was dismissed.

On January 14, 1991, the Roses filed with this Court a motion for relief from stay seeking the entry of an order allowing the Roses to proceed against the supersedeas bond

posted by Celotex. On April 16, 1991, this Court entered its Order Denying Motion for Relief From Stay filed by Charles Rose and Julia Rose.

81. Defendant Jesse Mills ("Mills") was awarded a judgment (the "Mills Judgment") on February 23, 1990, in the United States District Court, Southern District of Ohio, Western Division, in the amount of \$98,950.00, as compensatory damages for asbestos-related injuries. Carey Canada appealed the Mills Judgment to the United States Court of Appeals for the Sixth Circuit. To stay execution pending appeal, Carey Canada, as principal, and Home Indemnity, as surety, issued a bond on March 16, 1990 in the amount of \$119,997.00 (the "Mills Bond"). Home Indemnity acted as surety on the Mills Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Mills Bond, on March 16, 1990, the Debtors transferred to Home, for the indirect benefit of Mills, property of the Debtors having a value of \$119,997.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

82. Defendant Gracy Meadow Owners Association, Inc. ("Gracy Meadow") was awarded a judgment against Celotex (the "Gracy Meadow Judgment") on December 18, 1989, in the District Court of Travis County, Texas, 98th Judicial District, in the amount of \$147,806.50 (including \$115,000 fees and \$3,853.17 pre-judgment interest), as compensatory damages and \$57,906.67 as statutory (punitive) damages (not asbestos-related). Celotex appealed the Gracy Meadow Judgment to the Court of Appeals, Third District of Texas at Austin, Texas. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on March 15, 1990 in the amount of \$226,284.49 (the "Gracy Meadow Bond"). As collateral for the issuance of the Gracy Meadows Bond, on March 15, 1990,

the Debtors transferred to National Union, for the indirect benefit of Gracy Meadows, a security interest in the Debtors' cash previously transferred to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On August 21, 1991, Gracy Meadow filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On October 4, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

83. Defendant William A. Angotti ("Angotti"), was awarded a judgment on December 12, 1989, in the Circuit Court of Jackson County, Missouri at Kansas City, in the amount of \$189,500.00 as compensatory damages, and \$250,000.00 as punitive damages for asbestos-related injuries. Celotex appealed the Angotti Judgment to the Missouri Court of Appeals, Western District. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on February 20, 1990 in the amount of \$479,000.00 (the "Angotti Bond"). As collateral for the issuance of the Angotti Bond, on February 20, 1990, the Debtors transferred to National Union, for the indirect benefit of Angotti, a security interest in the Debtors' cash previously transferred into the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On December 17, 1990, Angotti filed with this Court an amended motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On January 16, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded.

The compensatory award was affirmed and the punitive award was reversed on appeal.

84. Defendants Donald E. Hogan and S. Joan Hogan (the "Hogans") were awarded a judgment (the "Hogan Judgment"), on November 21, 1989, in the Circuit Court of Jackson County, Missouri at Kansas City, in the amount of \$33,500.00, as compensatory damages against Celotex and one other defendant (and \$198,333.00 as punitive damages against Celotex) for asbestos-related injuries. Celotex appealed the Hogan Judgment to the Missouri Court of Appeals, Western District. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on February 20, 1990 in the amount of \$255,000.00 (the "Hogan Bond"). As collateral for the issuance of the Hogan Bond, on February 20, 1990, the Debtors transferred to National Union, for the indirect benefit of the Hogans, a security interest in the Debtors' cash previously transferred into the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On February 6, 1991, the Hogans filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On March 21, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded. The compensatory award was affirmed and the punitive award was reversed on appeal. Payments by other defendants have reduced Celotex' portion of the judgment to \$13,500.00.

85. Defendants Ernest Cleveland, Jr., and Winifred Cleveland (the "Clevelands") were awarded a judgment (the "Cleveland Judgment") on January 8, 1990, in the Court of Common Pleas of Philadelphia County, in the amount of \$246,000.00, as compensatory damages for asbestos-related

injuries and \$187,033.80 as delay damages (pre-judgment interest). Celotex appealed the Cleveland Judgment to the Pennsylvania Appellate Court. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on February 8, 1990, in the amount of \$519,640.56 (the "Cleveland Bond"). Home Indemnity acted as surety on the Cleveland Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Cleveland Bond, on February 8, 1990, the Debtors transferred to Home, for the indirect benefit of the Clevelands, property of the Debtors having a value of \$519,640.56. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

86. Defendants William Earl Glasscock, Roy B. Ghent, Lois T. Ghent, Charles and Leta Faye Marsh, Charles A. Reich, Gary and Linda Starkey, Gus and Lena Geisler, Malvin R. and Nancy Lane, Carlos G. and Delia S. Gonzalez, William E. and Sandra Smith, and James W. and Barbara E. Phillips ("Glasscock Group") were awarded a judgment (the "Glasscock Judgment") on January 19, 1990, in the United States District Court for the Eastern District of Texas, Marshall Division, in the total amount of \$317,625.00 as compensatory damages (and \$6,100,000.00 as punitive damages) for asbestos-related injuries. Individual awards were as follows: Glasscock, \$84,000.00 compensatory damages and \$600,000.00 punitive damages; Roy B. Ghent, \$12,500.00 compensatory damages and \$600,000.00 punitive damages; Lois T. Ghent, \$9,000.00 compensatory damages and \$100,000.00 punitive damages; Marsh, \$78,125.00 compensatory damages and \$600,000.00 punitive damages; Reich, \$40,000.00 compensatory damages and \$600,000.00 punitive damages; Starkey, \$11,250.00 compensatory damages and \$600,000.00 punitive damages; Geisler, \$17,500.00 compensatory damages and \$600,000.00 punitive damages; Lane, \$3,750.00 compensatory damages and \$600,000.00 punitive damages;

Gonzalez, \$10,000.00 compensatory damages and \$600,000.00 as punitive damages; Smith, \$12,500.00 compensatory damages and \$600,000.00 punitive damages; and Phillips, \$39,000.00 compensatory damages and \$600,000.00 punitive damages. Celotex appealed the Glasscock Judgment to the United States Court of Appeals for the Fifth Circuit. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on February 6, 1990 in the amount of \$7,160,010.11 (the "Glasscock Group Bond"). As collateral for the issuance of the Glasscock Group Bond, on February 6, 1990, the Debtors transferred to National Union, for the indirect benefit of the Glasscock Group, a security interest in the Debtors' cash previously transferred into the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On November 14, 1990, the Glasscock Group filed with this Court a motion challenging jurisdiction and for relief from stay seeking the entry of an order allowing continuation of the appellate process. On January 10, 1991, this Court entered its order regarding relief from stay, modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the Judgment affirmed.

87. Defendants Reuben S. Pool and Lee Pool, Charles Strong and Nancy Strong, Thomas Sledge and Betty Sledge and Bobbie Freeman, Donna Freeman and Ollie Freeman (the "Pool Group"), were awarded a judgment (the "Pool Judgment") on November 1, 1989, in the District Court of Rusk County, Texas, Fourth Judicial District, in the total amount of \$3,182,169.50 as compensatory damages against Celotex and five other defendants, and \$1,000,000.00 as punitive damages against Celotex for asbestos-related injuries. Celotex's share of the compensatory judgment was \$995,052.97. Individual awards against Celotex were as follows: Pool, \$206,036.72 compensatory damages and \$250,000.00 punitive damages; Strong, \$238,256.25

compensatory damages and \$250,000.00 punitive damages; Sledge, \$238,212.50 compensatory damages and \$250,000.00 punitive damages; and Freeman, \$312,547.50 compensatory damages and \$250,000.00 punitive damages. Celotex appealed the Pool Judgment to the Court of Civil Appeals, Sixth Supreme Judicial District of Texas, at Texarkana, Texas. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on February 2, 1990 in the amount of \$4,837,715.70 (the "Pool Group Bond"). As collateral for the issuance of the Pool Group Bond, on February 2, 1990, the Debtors transferred to National Union, for the indirect benefit of the Pool Group, a security interest in the Debtors' cash previously transferred to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On November 14, 1990, the Pool Group filed with this Court a motion challenging jurisdiction and for relief from stay seeking the entry of an order allowing continuation of the appellate process. On January 10, 1991, this Court entered its order regarding relief from stay, modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

88. Defendants Lessie L. Williams, Ralph E. Williams, Robert E. Williams, Carol A. Purdy, Murray W. Williams, Cindy L. Powdrill, Bobbie S. Phillips, Emory G.L. Williams and Patsy R. Fountain (the "Williams") were awarded a judgment (the "Williams Judgment") on November 1, 1989, in the District Court of Rusk County, Texas, 4th Judicial District in the amount of \$576,000.00 as compensatory damages against Celotex and four other defendants and \$200,000.00 as punitive damages against Celotex for asbestos-related injuries. Celotex's share of the compensatory award was \$120,000.00. Celotex appealed the Williams Judgment to the Court of Civil Appeals, Sixth Supreme Judicial District of Texas, at Texarkana, Texas. To stay

execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on February 2, 1990 in the amount of \$1,385,375.40 (the "Williams Bond"). As collateral for the issuance of the Williams Bond, on February 2, 1990, the Debtors transferred to National Union, for the indirect benefit of the Williams, a security interest in the Debtors' cash previously transferred by the Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On November 14, 1990, the Williams' filed with this Court a motion challenging jurisdiction and for relief from stay seeking the entry of an order allowing continuation of the appellate process. On January 10, 1991, this Court entered its order regarding relief from stay, modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

89. Defendant Marlin L. Eyster and Loy Eyster (the "Eysters") were awarded a judgment (the "Eyster Judgment") on December 1, 1989, in the Court of Common Pleas, Dauphin County, Pennsylvania, against Celotex and six other defendants, in the amount of \$75,000.00, as compensatory damages for asbestos-related injuries, and \$38,935.61 as delay damages (pre-judgment interest). Celotex' share of the judgment was \$16,276.52. Celotex appealed the Eyster Judgment to the Superior Court of Pennsylvania. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on February 1, 1990 in the amount of \$19,531.82 (the "Eyster Bond"). Allstate acted as surety on the Eyster Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Eyster Bond, on February 1, 1990, the Debtors transferred to Allstate, for the indirect benefit of the Eysters, property of the Debtors having a value of \$19,531.82. The Debtors' property that was transferred

was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

90. Defendants David Flack and Doris Flack (the "Flacks"), were awarded a judgment (the "Flack Judgment") on December 1, 1989, in the Court of Common Pleas, Dauphin County, Pennsylvania, against Celotex and six other defendants, in the amount of \$50,000.00, as compensatory damages for asbestos-related injuries and \$25,957.07 in delay damages (pre-judgment interest). Celotex' portion of the judgment was \$10,851.01. Celotex appealed the Flack Judgment to the Superior Court of Pennsylvania. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued the bond on February 1, 1990 in the amount of \$13,021.21 (the "Flack Bond"). Allstate acted as surety on the Flack Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Flack Bond, on February 1, 1990, the Debtors transferred to Allstate, for the indirect benefit of the Flacks, property of the Debtors having a value of \$13,021.21. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

91. Defendants Robert Goodsell and Lily Goodsell (the "Goodsells") were awarded a judgment (the "Goodsell Judgment") on December 1, 1989, in the Court of Common Pleas, Dauphin County, Pennsylvania, against Celotex and one other defendant, in the amount of \$20,000.00, as compensatory damages for asbestos-related injuries, and \$10,382.83 in delay damages (pre-judgment interest). Celotex' share of the judgment was \$15,191.42. Celotex appealed the Goodsell Judgment to the Superior Court of Pennsylvania. To stay execution pending

appeal, Celotex, as principal, and Allstate, as surety, issued a bond on February 1, 1990 in the amount of \$18,229.70 (the "Goodsell Bond"). Allstate acted as surety on the Goodsell Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Goodsell Bond, on February 1, 1990, the Debtors transferred to Allstate, for the indirect benefit of the Goodsells, property of the Debtors having a value of \$18,229.70. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

92. Defendants Charles Graham and Ethel Graham (the "Grahams"), were awarded a judgment (the "Graham Judgment"), on December 1, 1989, in the Court of Common Pleas, Dauphin County, Pennsylvania, against Celotex and six other defendants, in the amount of \$20,000.00, as compensatory damages for asbestos-related injuries, and \$10,382.83 as delay damages. Celotex' share of the judgment was \$4,340.40. Celotex appealed the Graham Judgment to the Superior Court of Pennsylvania. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on February 1, 1990 in the amount of \$5,208.48 (the "Graham Bond"). Allstate acted as surety on the Graham Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Graham Bond, on February 1, 1990, the Debtors transferred to Allstate, for the indirect benefit of the Grahams, property of the Debtors having a value of \$5,208.48. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

93. Defendant Mary McCorry ("McCorry"), individually and as Administratrix of the Estate of Donald J. McCorry, deceased, was awarded a judgment (the "McCorry Judgment") on December 20, 1989, in the Supreme Court of the State of New York, County of New York, in the amount of \$268,813.40 (including pre-judgment interest and costs), as compensatory damages for asbestos-related injuries. Celotex appealed the McCorry Judgment to the Supreme Court of the State of New York, Appellate Division. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on January 20, 1990 in the amount of \$268,813.40 (the "McCorry Bond"). As collateral for the issuance of the McCorry Bond, on January 20, 1990, the Debtors transferred to National Union, for the indirect benefit of McCorry, a security interest in the Debtors' cash previously transferred by the Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On November 5, 1990, McCorry filed with this Court a motion for relief from stay seeking the entry of an order allowing continuation of the appellate process. On January 15, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgment affirmed.

94. Defendant, Sylvonnia Stridiron ("Stridiron"), Individually and as Administratrix of the Estate of Donald W. Stridiron, deceased, was awarded a judgment (the "Stridiron Judgment") on December 20, 1989, in the Supreme Court of the State of New York, County of New York, in the amount of \$142,685.60 (including pre-judgment interest and costs), as compensatory damages for asbestos-related injuries. Celotex appealed the Stridiron judgment to the Supreme Court of the State of New York, Appellate Division. To stay execution

pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on January 20, 1990, in the amount of \$142,658.60 (the "Stridiron Bond"). As collateral for the issuance of the Stridiron Bond, on January 20, 1990, the Debtors transferred to National Union, for the indirect benefit of Stridiron, a security interest in the Debtors' cash previously transferred by the Debtors into the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On November 5, 1990, Stridiron filed with this Court a motion for relief from stay seeking the entry of an order allowing continuation of the appellate process. On January 15, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgment affirmed.

95. Defendant Howard Legg ("Legg") was awarded a judgment (the "Legg Judgment") on December 11, 1989, in the United States District Court, Northern District of Georgia, Atlanta Division, in the amount of \$200,200.00, as compensatory damages for asbestos-related injuries. Celotex and Carey Canada appealed the Legg Judgment to the United States Court of Appeals for the Eleventh Circuit. To stay execution pending appeal, Celotex and Carey Canada, as principals, and National Union, as surety, issued a bond on January 12, 1990 in the amount of \$228,923.70 (the "Legg Bond"). As collateral for the issuance of the Legg Bond, on January 12, 1990, the Debtors transferred to National Union, for the indirect benefit of Legg, a security interest in the Debtors' cash previously transferred by the Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On May 10, 1991, Legg filed with this Court an amended motion for relief from stay seeking the entry of an order allowing continuation of the appellate process. On July 17, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgment affirmed.

96. Defendant Howard Pitts ("Pitts") was awarded a judgment (the "Pitts Judgment") on December 11, 1989, in the United States District Court, Northern District of Georgia, Atlanta Division, in the amount of \$361,100.00, as compensatory damages for asbestos-related injuries. Celotex and Carey Canada appealed the Pitts Judgment to the United States Court of Appeals for the Eleventh Circuit. To stay execution pending appeal, Celotex and Carey Canada, as principals, and National Union, as surety, issued a bond on January 12, 1990 in the amount of \$408,890.35 (the "Pitts Bond"). As collateral for the issuance of the Pitts Bond, on January 12, 1990, the Debtors transferred to National Union, for the indirect benefit of Pitts, a security interest in the Debtors' cash previously transferred by the Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On May 10, 1991, Pitts filed with this Court an amended motion for relief from stay seeking the entry of an order allowing continuation of the appellate process. On July 17, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgment affirmed.

97. Defendant Robert L. Coker ("Coker") was awarded a judgment (the "Coker Judgment") on August 21, 1989, in the United States District Court for the Northern District of Georgia, Atlanta Division, against Celotex, Carey Canada and one other defendant, in the amount of \$167,000.00, as compensatory damages for asbestos-related injuries. Celotex and Carey Canada's shares were \$55,666.67 each. Celotex and Carey Canada appealed the Coker Judgment to the United States Court of Appeals for the Eleventh Circuit. To stay execution pending appeal, Celotex and Carey Canada, as principals, and National Union, as surety, issued a bond on January 5, 1990 in the amount of \$194,945.80 (the "Coker Bond"). As collateral for the issuance of the Coker Bond, on January 5, 1990, the Debtors transferred to National Union, for the indirect benefit of Coker, a security interest in the Debtors' cash previously transferred by the Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On May 10, 1991, Coker filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 17, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgment affirmed.

98. Defendant Warren Harvey Coker ("Coker") was awarded a judgment (the "Coker Judgment"), on August 21, 1989, in the United States District Court for the Northern District of Georgia, Atlanta Division, against Celotex, Carey Canada and one other defendant in the amount of \$131,000.00, as compensatory damages for asbestos-related injuries. Celotex' and Carey Canada's shares were \$43,666.67 each. Celotex and Carey Canada appealed the Coker Judgment to the United States Court of Appeals for the Eleventh Circuit. To stay execution pending appeal, Celotex and Carey Canada, as principals, and

National Union, as surety, issued a bond on January 5, 1990 in the amount of \$153,999.40 (the "Coker Bond"). As collateral for the issuance of the Coker Bond, on January 5, 1990, the Debtors transferred to National Union, for the indirect benefit of Coker, a security interest in the Debtors' cash previously transferred by the Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On May 10, 1991, Coker filed with this Court a motion for relief from stay seeking the entry of an order allowing continuation of the appellate process. On July 17, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgment affirmed.

99. Defendant Troy Hilliard Manning ("Manning") was awarded a judgment (the "Manning Judgment") on August 21, 1989, in the United States District Court for the Northern District of Georgia, Atlanta Division against Celotex, Carey Canada and one other defendant in the amount of \$370,000.00, as compensatory damages for asbestos-related injuries. Celotex' and Carey Canada's shares were \$123,333.33 each. Celotex and Carey Canada appealed the Manning Judgment to the United States Court of Appeals for the Eleventh Circuit. To stay execution pending appeal, Celotex and Carey Canada, as principals, and National Union, as surety, issued a bond on January 5, 1990 in the amount of \$425,838.00 (the "Manning Bond"). As collateral for the issuance of the Manning Bond, on January 5, 1990, the Debtors transferred to National Union, for the indirect benefit of Manning, a security interest in the Debtors' cash previously transferred to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On May 10, 1991, Manning filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 17, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgment affirmed.

100. Defendant Charles R. Moore ("Moore") was awarded a judgment (the "Moore Judgment") on August 21, 1989, in the United States District Court for the Northern District of Georgia, Atlanta Division, against Celotex, Carey Canada and one other defendant, in the amount of \$486,000.00, as compensatory damages for asbestos-related injuries. Celotex' and Carey Canada's shares were \$162,000.00 each. Celotex and Carey Canada appealed the Moore Judgment to the United States Court of Appeals for the Eleventh Circuit. To stay execution pending appeal, Celotex and Carey Canada, as principals, and National Union, as surety, issued a bond on January 5, 1990 in the amount of \$557,776.40 (the "Moore Bond"). As collateral for the issuance of the Moore Bond, on January 5, 1990, the Debtors transferred to National Union, for the indirect benefit of Moore, a security interest in the Debtors' cash previously transferred by Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On May 10, 1991, Moore filed with this Court a motion for relief from stay seeking the entry of an order allowing continuation of the appellate process. On July 17, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgment affirmed.

101. Defendants George Scalone and Mary Ann Scalone (the "Scalones") were awarded a judgment (the "Scalone Judgment") on December 15, 1989, in the United States District Court, Southern District of New York, against Celotex and one other defendant, in the amount of \$512,000.00, as compensatory damages for asbestos-related injuries. Celotex' share of the judgment was \$256,000.00. Celotex appealed the Scalone Judgment to the United States Court of Appeals for the Second Circuit. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on January 5, 1990 in the amount of \$284,160.00 (the "Scalone Bond"). As collateral for the issuance of the Scalone Bond, on January 5, 1990, the Debtors transferred to National Union, for the indirect benefit of the Scalones, a security interest in the Debtors' cash previously transferred by Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein. The Judgment has been fully satisfied by the other defendant, and accordingly Celotex has no obligation to the Scalones.

102. Defendants Paul L. Siesko and Penelope M. Siesko (the "Sieskos") were awarded a judgment (the "Siesko Judgment"), on November 22, 1989, in the United States District Court, Middle District of Pennsylvania, in the amount of \$120,000.00 as compensatory damages for asbestos-related injuries. Setoffs due to prior payments by other defendants reduced the judgment against Celotex to \$50,000.00. Celotex appealed the Siesko Judgment to the United States Court of Appeals, Third Circuit. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on January 5, 1990 in the amount of \$50,000.00 (the "Siesko Bond"). Allstate acted as surety on the Siesko Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Siesko Bond, on January 5, 1990, the Debtors transferred to Allstate, for the indirect benefit of the Sieskos, property of the Debtors having a value of \$50,000.00. The Debtors' property that was transferred was in

the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

103. Defendant Joanne Borman ("Borman"), Executrix of the Estate of Richard Borman, deceased, and in her own right, was awarded a judgment (the "Borman Judgment"), on August 30, 1989, in the United States District Court for the Eastern District of Pennsylvania, in the amount of \$59,191.00 as compensatory damages for asbestos-related injuries, and \$14,732.64 as delay damages (pre-judgment interest). Celotex appealed the Borman judgment to the United States Court of Appeals for the Third Circuit. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on January 4, 1990 in the amount of \$88,708.00 (the "Borman Bond"). Allstate acted as surety on the Borman Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Borman Bond, on January 4, 1990, the Debtors transferred to Allstate, for the indirect benefit of the Bormans, property of the Debtors having a value of \$88,708.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

On December 2, 1991, Borman filed with this Court a motion for relief from stay seeking the entry of an order allowing continuation of the appellate process. On January 31, 1992, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgment affirmed.

104. Defendant Bertha Hoffman ("Hoffman"), Administratrix of the Estate of Morris Hoffman, deceased, and in her own right, was awarded a judgment (the "Hoffman Judgment"), on November 13, 1989, in the Court of Common Pleas, First Judicial District of Pennsylvania, Civil Trial Division, in the amount of \$55,000.00, as compensatory damages for asbestos-related injuries, as well as \$37,517.00 as delay damages (pre-judgment interest). Celotex appealed the Hoffman Judgment to the Pennsylvania Appellate Court. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on December 15, 1989 in the amount of \$111,020.40 (the "Hoffman Bond"). As collateral for the issuance of the Hoffman Bond, on December 15, 1989, the Debtors transferred to National Union, for the indirect benefit of Hoffman, a security interest in the Debtors' cash previously transferred by Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

105. Defendant Kathleen Novelli ("Novelli"), Executrix of the Estate of George Novelli, deceased, was awarded a judgment (the "Novelli Judgment") on September 26, 1989, in the Philadelphia County Court of Common Pleas, Civil Trial Division apportioned against Celotex, in the amount of \$82,500.00, as compensatory damages for asbestos-related injuries and \$56,609.00 as delay damages (pre-judgment interest). Celotex appealed the Novelli Judgment to the Pennsylvania Appellate Court. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on December 15, 1989 in the amount of \$166,930.80 (the "Novelli Bond"). As collateral for the issuance of the Novelli Bond, on December 15, 1990, the Debtors transferred to National Union, for the indirect benefit of Novelli, a security interest in the Debtors' cash previously transferred by Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

106. Defendant Marion George ("George") was awarded a judgment (the "George Judgment"), on October 19, 1989, in the United States District Court, Eastern District of New York, in the amount of \$588,000.00, as compensatory damages for asbestos-related injuries. Celotex appealed the George Judgment to the United States Court of Appeals, for the Second Circuit. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on December 13, 1989 in the amount of \$652,680.00 (the "George Bond"). Allstate acted as surety on the George Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the George Bond, on December 13, 1989, the Debtors transferred to Allstate, for the indirect benefit of George, property of the Debtors having a value of \$652,680.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

107. Defendants George R. Beecher and Beatrice L. Beecher (the "Beechers") were awarded a judgment (the "Beecher Judgment") on May 5, 1989, in the State of Michigan, Circuit Court for the County of Wayne, in the amount of \$203,698.29 (including pre-judgment interest of \$67,276.07), as compensatory damages for asbestos-related injuries. Celotex appealed the Beecher Judgment to the State of Michigan Court of Appeals. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on November 20, 1989 in the amount of \$255,000.00 (the "Beecher Bond"). As collateral for the issuance of the Beecher Bond, on November 20, 1989, the Debtors transferred to National Union, for the indirect benefit of the Beechers, a security interest in the Debtors' cash previously transferred to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On June 20, 1991, the Beechers filed with this Court a motion for relief from stay seeking the entry of an order allowing continuation of the appellate process. On July 24, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

108. Defendants Joseph E. Chislea and Nancy Chislea (the "Chisleas") were awarded a judgment (the "Chislea Judgment") on May 5, 1989, in the State of Michigan, Circuit Court for the County of Wayne, in the amount of \$196,855.00 (including pre-judgment interest of \$65,016.86), as compensatory damages for asbestos-related injuries. Celotex appealed the Chislea Judgment to the State of Michigan Court of Appeals. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on November 20, 1989 in the amount of \$246,000.00 (the "Chislea Bond"). As collateral for the issuance of the Chislea Bond, on November 20, 1989, the Debtors transferred to National Union, for the indirect benefit of the Chisleas, a security interest in the Debtors' cash previously transferred by Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On June 20, 1991, the Chisleas filed with this Court a motion for relief from stay seeking the entry of an order allowing continuation of the appellate process. On July 24, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

109. Defendants James E. Roberts and Patricia E. Roberts (the "Roberts") were awarded a judgment (the "Roberts Judgment") on May 5, 1989, in the State of Michigan, Circuit Court for the County of Wayne, in the amount of \$241,853.68 (including pre-judgment interest of \$78,818.51), as compensatory damages for asbestos-related injuries. Celotex appealed the Roberts Judgment to the State of Michigan Court of Appeals. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on November 20, 1989 in the amount of \$302,000.00 (the "Roberts Bond"). As collateral for the issuance of the Roberts Bond, on November 20, 1990, the Debtors transferred to National Union, for the indirect benefit of the Roberts, a security interest in the Debtors' cash previously transferred by Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On June 20, 1991, the Roberts filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 24, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

110. Defendant Jean Marie Schutte ("Schutte"), Personal Representative of the Estate of Edward R. Tarnosky, deceased, was awarded a judgment (the "Schutte Judgment") on August 14, 1989, in the State of Michigan, Circuit Court for the County of Wayne, in the amount of \$164,469.85 (including pre-judgment interest of \$56,817.85), as compensatory damages for asbestos-related injuries. Celotex appealed the Schutte Judgment to the State of Michigan Court of Appeals. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on November 20, 1989 in the amount of \$206,000.00 (the "Schutte Bond"). As collateral for the issuance of the Schutte Bond, on November 20, 1989, the Debtors

transferred to National Union, for the indirect benefit of Schutte, a security interest in the Debtors' cash previously transferred by Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On June 20, 1991, Schutte filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 23, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

111. Defendant Marie L. Vachon ("Vachon"), Personal Representative of the Estate of Emil J. Vachon, deceased, was awarded a judgment (the "Vachon Judgment") on May 5, 1989, in the State of Michigan, Circuit Court for the County of Wayne, in the amount of \$418,473.33 (including pre-judgment interest of \$136,378.93), as compensatory damages for asbestos-related injuries. Celotex appealed the Vachon Judgment to the State of Michigan Court of Appeals. To stay execution pending appeal, Celotex, as principal, and National Union, as surety, issued a bond on November 20, 1989 in the amount of \$523,000.00 (the "Vachon Bond"). As collateral for the issuance of the Vachon Bond, on November 20, 1989, the Debtors transferred to National Union, for the indirect benefit of Vachon, a security interest in the Debtors' cash previously transferred by Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein.

On June 20, 1991, the Vachons filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 24, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including

the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

112. Defendants Louis Colon and Jeanette Colon (the "Colons") were awarded a judgment (the "Colon Judgment") on April 14, 1989, in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in the amount of \$429,700.00, as compensatory damages for asbestos-related injuries. Celotex appealed the Colon Judgment to the Florida Third District Court of Appeal. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on November 6, 1989 in the amount of \$532,828.00 (the "Colon Bond"). Home Indemnity acted as the surety on the Colon Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Colon Bond, on November 6, 1989, the Debtors transferred to Home, for the indirect benefit of the Colons, property of the Debtors having a value of \$532,828.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

On March 21, 1991, the Colons filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On April 26, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates.

113. Defendant Frank Rummo ("Rummo") was awarded a judgment (the "Rummo Judgment") on October 25, 1989, in the United States District Court, Eastern District of New York, in the amount of \$650,000.00, as compensatory damages for asbestos-related injuries. Celotex appealed the Rummo Judgment

to the United States Court of Appeals for the Second Circuit. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on November 6, 1989 in the amount of \$721,500.00 (the "Rummo Bond"). Home Indemnity acted as surety on the Rummo Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Rummo Bond, on November 6, 1989, the Debtors transferred to Home, for the indirect benefit of Rummo, property of the Debtors having a value of \$721,500.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

114. Defendants Clyde A. Thompson and Aline Thompson (the "Thompsons") were awarded a judgment (the "Thompson Judgment") on April 14, 1989, in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, in the amount of \$97,500.00, as compensatory damages for asbestos-related injuries. Celotex appealed the Thompson Judgment to the Florida Fourth District Court of Appeal. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on November 6, 1989 in the amount of \$120,900.00 (the "Thompson Bond"). Home Indemnity acted as surety on the Thompson Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Thompson Bond, on November 6, 1989, the Debtors transferred to Home, for the indirect benefit of the Thompsons, property of the Debtors having a value of \$120,900.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

On March 21, 1991, the Thompsons filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On April 26, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgment affirmed.

115. Defendant Clifford Chamlee ("Chamlee") was awarded a judgment (the "Chamlee Judgment") on September 15, 1989, in the United States District Court for the Western District of Texas, Midland-Odessa Division in the amount of \$50,000.00, as punitive damages for asbestos-related injuries. Celotex appealed the Chamlee Judgment to the United States Court of Appeals for the Fifth Circuit. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on October 23, 1989 in the amount of \$65,000.00 (the "Chamlee Bond"). Home Indemnity acted as surety on the Chamlee Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Chamlee Bond, on October 23, 1989, the Debtors transferred to Home, for the indirect benefit of Chamlee, property of the Debtors having a value of \$65,000.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

On May 10, 1991, Chamlee filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 17, 1991, this Court entered its Order Denying Motion for Relief From Stay. The appellate process has not been concluded.

116. Defendant Angelina O'Brien ("O'Brien"), individually and as Administratrix of the Estate of Richard O'Brien, deceased, was awarded a judgment (the "O'Brien Judgment") on August 18, 1989, in the United States District Court, Southern District of New York, in the amount of \$213,861.00, as compensatory damages for asbestos-related injuries. Celotex appealed the O'Brien Judgment to the United States Court of Appeals for the Second Circuit. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on October 20, 1989 in the amount of \$238,386.00 (the "O'Brien Bond"). Home Indemnity acted as surety on the O'Brien Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the O'Brien Bond, on October 20, 1989, the Debtors transferred to Home, for the indirect benefit of O'Brien, property of the Debtors having a value of \$238,386.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

On October 22, 1990, O'Brien filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On January 16, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgment affirmed.

117. Defendant Shirley Tate ("Tate"), Individually, as Executrix of the Estate of James Fisk Tate, as next friend of Jonathan Tate, a minor, and on behalf of James Fisk Tate, Jr. and Vicki Tate Gibson, was awarded a judgment (the "Tate Judgment"), on May 30, 1989, in the District Court of Nueces County, Texas, 94th Judicial District against Celotex and one

other defendant in the amount of \$1,084,060.43 (including pre-judgment interest of \$156,727.12), as compensatory damages and \$1,000,000.00 as punitive damages for asbestos-related injuries. Celotex' share of the compensatory award was \$542,030.23. Celotex appealed the Tate Judgment to the Court of Civil Appeals, 13th Supreme Judicial District of Texas, at Corpus Christi, Texas. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on October 19, 1989 in the amount of \$2,415,000.00 (the "Tate Bond"). Home Indemnity acted as surety on the Tate Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Tate Bond, on October 19, 1989, the Debtors transferred to Home, for the indirect benefit of Tate, property of the Debtors having a value of \$2,415,000.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

Bonded Claimants Receiving Transfers Outside One Year of Petition Date

118. The defendants named below in paragraphs 119 through 143 were the beneficiaries of transfers of the Debtors' property through issuance of Bonds outside one year of the Petition Date.

119. Defendant Paul Balbos ("Balbos"), Personal Representative for the Estate of Leslie Balbos, deceased, was awarded a judgment (the "Balbos Judgment"), on April 26, 1989, in the Circuit Court for Baltimore City, Maryland against Celotex and four other defendants in the amount of \$2,000,000.00, as compensatory damages for asbestos-related injuries. Celotex appealed the Balbos Judgment to the Court of Special Appeals of Maryland. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on October 3, 1989 in the amount of \$2,300,000.00 (the "Balbos

Bond"). Home Indemnity acted as surety on the Balbos Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Balbos Bond, on October 3, 1989, the Debtors transferred to Home, for the indirect benefit of Balbos, property of the Debtors having a value of \$2,300,000.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

On September 5, 1991, Balbos filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On November 1, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The Balbos Judgment has been satisfied and, accordingly, Celotex has no obligation to Balbos.

On information and belief, on or about May 26, 1992, Intervenor Defendant Porter Hayden Company ("Porter Hayden") paid its obligation on the Balbos Judgment. Since Porter Hayden was primarily liable on the Balbos Judgment it is not entitled to subrogation against Celotex and recognition of subrogation in favor of Porter Hayden would work on injustice to the rights of others.

120. Defendant Lucille Killian ("Killian"), Personal Representative for the Estate of Sutton Knuckles, deceased, was awarded a judgment (the "Killian Judgment") on April 26, 1989, in the Circuit Court for Baltimore City, Maryland against Celotex and 11 other defendants in the amount of \$1,800,000.00, as compensatory damages for asbestos-related injuries. Celotex' portion of the judgment was \$150,000.00. Celotex appealed the Killian Judgment to the Court of Special Appeals of Maryland.

To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on October 3, 1989 in the amount of \$2,000,000.00 (the "Killian Bond"). Home Indemnity acted as surety on the Killian Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Killian Bond, on October 3, 1989, the Debtors transferred to Home, for the indirect benefit of Killian, property of the Debtors having a value of \$2,000,000.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

On September 5, 1991, Killian filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On November 1, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgment affirmed.

121. Defendant Beth Israel ("Beth Israel") was awarded a judgment (the "Beth Israel Judgment") on August 21, 1989, in the Civil District Court for the Parish of Orleans, State of Louisiana in the amount of \$206,476.00 as compensatory damages (not asbestos-related). Celotex appealed the Beth Israel Judgment to the Louisiana Appellate Court. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on September 21, 1989 in the amount of \$643,399.86 (the "Beth Israel Bond"). Home Indemnity acted as surety on the Beth Israel Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Beth Israel Bond, on September 21, 1989, the Debtors transferred to Home,

for the indirect benefit of Beth Israel, property of the Debtors having a value of \$643,399.86. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

On October 23, 1990, Beth Israel filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On November 30, 1990, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the Judgment affirmed.

122. Defendant Charles Hagen ("Hagen") was awarded a judgment (the "Hagen Judgment") on June 12, 1989, in the Circuit Court of the City of St. Louis, State of Missouri against Celotex and two other defendants in the amount of \$1,780,000.00, as compensatory damages for asbestos-related injuries. Celotex appealed the Hagen Judgment to the Missouri Court of Appeals, Eastern District. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on September 21, 1989 in the amount of \$2,200,000.00 (the "Hagen Bond"). Home Indemnity acted as surety on the Hagen Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Hagen Bond, on September 21, 1989, the Debtors transferred to Home, for the indirect benefit of Hagen, property of the Debtors having a value of \$2,200,000.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein. While this case has been stayed as to Celotex, the co-defendants have

been successful in their appeal on grounds that will be applicable to Celotex as well.

The Hagen Judgment was appealed by two of Celotex' co-defendants, Fibreboard Corporation ("Fibreboard") and Owens-Illinois, Inc. ("OI"). The Supreme Court of Missouri ultimately affirmed the reversal of the judgment against OI entered by the Court of Appeals, Eastern District of Missouri, and remanded with directions to enter judgment in favor OI. It also affirmed the Court of Appeals' reversal as to Fibreboard and remanded for a new trial. The decision to reverse as to OI and to reverse and remand as to Fibreboard was based on the same facts and legal arguments presented to the trial court with respect to Celotex. Thus, on July 14, 1992, Celotex filed a Motion For Order Modifying Stay As To Charles Hagen To Allow The Celotex Corporation To Pursue Appeal And Obtain Release Of Supersedeas Bond. The Motion was granted and the request to release the Hagen Bond is pending.

123. Defendant Sylvia Keller ("Keller"), Administratrix of the Estate of Martin Keller, deceased, was awarded a judgment (the "Keller Judgment") on June 5, 1989, in the Court of Common Pleas, County of Philadelphia, Civil Trial Division in the amount of \$58,480.33, as compensatory damages for asbestos-related injuries and \$38,211.04 as delay damages (pre-judgment interest). Celotex paid the compensatory judgment in June 1989 and appealed the delay damages portion of the Keller Judgment to the Supreme Court of Pennsylvania. To stay execution pending appeal, Celotex, as principal, and Home Indemnity, as surety, issued a bond on September 21, 1989 in the amount of \$45,853.25 (the "Keller Bond"). Home Indemnity acted as surety on the Keller Bond pursuant to the Home Agreement between the Debtors and Home more specifically described in paragraphs 173-174 herein. As collateral for the issuance of the Keller Bond, on September 21, 1989, the Debtors transferred to Home, for the indirect benefit of Keller, property of the Debtors having a value of \$45,853.25. The Debtors' property that was

transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Home Agreement more specifically described in paragraphs 173-174 herein.

124. Defendant Mary Elizabeth Syverson ("Syverson"), as Personal Representative of the Estate of Arthur Syverson, deceased, was awarded a judgment (the "Syverson Judgment"), on or about June 26, 1989, in the United States District Court, Western District of Washington at Tacoma against Celotex and Intervenor Defendant Fibreboard Corporation ("Fibreboard") in the amount of \$91,571.93 as compensatory damages for asbestos-related injuries. Celotex' share of the Syverson Judgment was \$45,785.97. Celotex appealed the Syverson Judgment to the United States Court of Appeals for the Ninth Circuit. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on September 9, 1989 in the amount of \$125,000.00 (the "Syverson Bond"). Allstate acted as surety on the Syverson Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Syverson Bond, on September 9, 1989, the Debtors transferred to Allstate, for the indirect benefit of Syverson, property of the Debtors having a value of \$125,000.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein. The claim of Syverson against Celotex has been satisfied and, accordingly, Celotex has no obligation to Syverson.

On information and belief, on or about August 18, 1991, Syverson executed an instrument entitled Assignment of Judgment purporting to sell, assign and transfer the Syverson Judgment to Intervenor Defendant Fibreboard in exchange for a payment by Fibreboard of its obligation on the Syverson Judgment. Since Fibreboard was primarily liable on the Syverson Judgment

it is not entitled to subrogation against Celotex and recognition of subrogation in favor of Fibreboard would work an injustice to the rights of others.

125. Defendants Steven Pelletier and Edith Pelletier (the "Pelletiers") were awarded a judgment (the "Pelletier Judgment"), on May 8, 1989, in the United States District Court, Southern District of Ohio, Western Division in the amount of \$45,000, as compensatory damages against Carey Canada for asbestos-related injuries. Carey Canada appealed the Pelletier Judgment to the United States Court of Appeals for the Sixth Circuit. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued the bond on September 5, 1989 in the amount of \$59,895.00 (the "Pelletier Bond"). Allstate acted as surety on the Pelletier Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Pelletier Bond, on September 5, 1989, the Debtors transferred to Allstate, for the indirect benefit of the Pelletiers, property of the Debtors having a value of \$59,895.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

126. Defendant Mark T. Hynes ("Hynes") was awarded a judgment (the "Hynes Judgment"), on August 1, 1989, in the District Court, County of Boulder, Colorado in the amount of \$340,257.24 (including costs of \$21,608.54) as compensatory damages for asbestos-related injuries. Celotex appealed the Hynes Judgment to the Colorado Court of Appeals. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on August 23, 1989 in the amount of \$652,678.23 (the "Hynes Bond"). Allstate acted as surety on the Hynes Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Hynes Bond,

on August 23, 1989, the Debtors transferred to Allstate, for the indirect benefit of Hynes, property of the Debtors having a value of \$652,678.23. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

On June 25, 1991, Hynes filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 23, 1991, this Court entered its Order Regarding Relief From Stay modifying the \$362 Stay and the \$105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgment affirmed.

127. Defendants James M. Dartez, John David Burke, William B. Hardy, Cecil A. Overstreet, and Richard C. Smith (the "Dartez Group") were awarded a judgment (the "Dartez Judgment") on July 24, 1989, in the United States District Court for the Eastern Division of Texas, Beaumont Division against Celotex and a number of other defendants. Celotex' share of this Judgment was \$680,966.64 (including \$118,184.29 pre-judgment interest) as compensatory damages for asbestos-related injuries. Celotex appealed the Dartez Judgment to the United States Court of Appeals for the Fifth Circuit. To stay execution pending appeal, Celotex, as principal and Allstate, as surety, issued a bond on August 16, 1989 in the amount of \$680,966.64 (the "Dartez Group Bond"). Allstate acted as surety on the Dartez Group Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Dartez Group Bond, on August 16, 1990, the Debtors transferred to Allstate, for the indirect benefit of the Dartez Group, property of the Debtors having a value of \$680,966.64. The Debtors' property that was transferred was in the form of an assignment

of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein. The Dartez Judgment has been vacated and the Dartez Group of cases has been remanded to the trial court for a new trial.

128. Defendant Margaret D. Adams ("Adams"), Personal Representative of the Estate of William J. Adams, deceased, was awarded a judgment (the "Adams Judgment"), on July 5, 1989, the State of Michigan, in the Circuit Court for the County of Wayne in the amount of \$1,109,407.55 (including pre-judgment interest of \$357,571.55) as compensatory damages for asbestos-related injuries. Celotex appealed the Adams Judgment to the Michigan Court of Appeals. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on July 26, 1989 in the amount of \$1,387,000.00 (the "Adams Bond"). Allstate acted as surety on Adams Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Adams Bond, on July 26, 1989, the Debtors transferred to Allstate, for the indirect benefit of Adams, property of the Debtors having a value of \$1,387,000.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

On June 20, 1991, Adams filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 24, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

129. Defendant Matthew J. Bordeaux ("Bordeaux"), Personal Representative of the Estate of James J. Bordeaux, deceased, was awarded a judgment (the "Bordeaux Judgment"), on July 5, 1989, in the State of Michigan, Circuit Court for the County of Wayne in the amount of \$263,089.35 (including pre-judgment interest of \$81,151.35) as compensatory damages for asbestos-related injuries. Celotex appealed the Bordeaux Judgment to the Michigan Court of Appeals. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on July 26, 1989 in the amount of \$329,000.00 (the "Bordeaux Bond"). Allstate acted as surety on the Bordeaux Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Bordeaux Bond, on July 26, 1989, the Debtors transferred to Allstate, for the indirect benefit of Bordeaux, property of the Debtors having a value of \$329,000.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

On June 20, 1991, Bordeaux filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 24, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

130. Defendants James J. Conley and Maxine D. Conley (the "Conleys") were awarded a judgment (the "Conley Judgment"), on July 5, 1989, in the State of Michigan, Circuit Court for the County of Wayne in the amount of \$1,260,816.13 (including pre-judgment interest of \$406,371.91) as compensatory damages for asbestos-related injuries. Celotex appealed the

Conley Judgment to the Michigan Court of Appeals. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued the bond on July 26, 1989 in the amount of \$1,576,000.00 (the "Conley Bond"). Allstate acted as surety on the Conley Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Bowers Bond, on October 4, 1990, the Debtors transferred to Allstate, for the indirect benefit of the Conleys, property of the Debtors having a value of \$1,576,000.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

On June 20, 1991, the Conleys filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 24, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has not been concluded.

131. Defendant Danny Wilburn Berlin ("Berlin") was awarded a judgment (the "Berlin Judgment"), on March 9, 1989, in the United States District Court for the Middle District of Tennessee, Nashville Division in the amount of \$1,894,432.82 as compensatory damages for asbestos-related injuries. Celotex appealed the Berlin Judgment to the United States Court of Appeals for the Sixth Circuit. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on July 17, 1989 in the amount of \$2,235,430.00 (the "Berlin Bond"). Allstate acted as surety on the Berlin Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Berlin Bond, on July 17, 1989,

the Debtors transferred to Allstate, for the indirect benefit of Berlin, property of the Debtors having a value of \$2,235,430.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

On January 14, 1991, Berlin filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On February 20, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgment affirmed.

132. Defendants Billy McCleary and Nancy McCleary (the "McClearys") were awarded a judgment (the "McCleary Judgment") on June 16, 1989, in the United States District Court for the Western District of Texas, San Antonio Division in the amount of \$149,870.62, as compensatory damages and \$200,000.00 as punitive damages for asbestos-related injuries. Celotex appealed the McCleary Judgment to the United States Court of Appeals for the Fifth Circuit. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on July 12, 1989 in the amount of \$399,095.98 (the "McCleary Bond"). Allstate acted as surety on the McCleary Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the McCleary Bond, on July 12, 1989, the Debtors transferred to Allstate, for the indirect benefit of the McClearys, property of the Debtors having a value of \$399,095.98. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

On May 10, 1991, the McClearys filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On July 17, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgment affirmed.

133. Defendant Arthur J. Nelson ("Nelson") was awarded a judgment (the "Nelson Judgment") on March 14, 1989, in the United States District Court for the Western District of Washington at Tacoma against Celotex and Fibreboard in the amount of \$290,250.00 as compensatory damages for asbestos-related injuries. Celotex appealed the Nelson Judgment to the United States Court of appeals for the Ninth Circuit. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on June 27, 1989 in the amount of \$350,000.00 (the "Nelson Bond"). Allstate acted as surety on the Nelson Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Nelson Bond, on June 27, 1989, the Debtors transferred to Allstate, for the indirect benefit of Nelson, property of the Debtors having a value of \$350,000.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein. The claim of Nelson against Celotex has been satisfied and, accordingly, Celotex has no obligation to Nelson.

On information and belief, on or about November 16, 1990, Nelson executed an instrument entitled Assignment of Judgment purporting to sell, assign and transfer the Nelson Judgment to Intervenor Defendant Fibreboard in exchange for a

payment by Fibreboard of its obligation on the Nelson Judgment. Since Fibreboard was primarily liable on the Nelson Judgment it is not entitled to subrogation against Celotex and recognition of subrogation in favor of Fibreboard would work an injustice to the rights of others.

134. Defendant William Van Hout ("Van Hout") was awarded a judgment (the "Van Hout Judgment") on May 1, 1989, in the Superior Court of Washington for King County in the amount of \$428,438.56 (including costs of \$259.56) as compensatory damages for asbestos-related injuries. Celotex appealed the Van Hout Judgment to the Court of Appeals of the State of Washington. To stay execution pending appeal, Celotex, as principal, and Allstate, as surety, issued a bond on June 27, 1989 in the amount of \$595,168.00 (the "Van Hout Bond"). Allstate acted as surety on the Van Hout Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Van Hout Bond, on June 27, 1989, the Debtors transferred to Allstate, for the indirect benefit of Van Hout, property of the Debtors having a value of \$595,168.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

On December 20, 1990, Van Hout filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On February 1, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. Celotex was successful in its appeal; however, Van Hout's petition for review to the Washington State Supreme Court is still pending.

135. Defendant Bennie Edwards ("Edwards") was awarded a judgment (the "Edwards Judgment"), on April 17, 1989, in the United States District Court for the Northern District of Texas, Wichita Falls Division in the amount of \$35,253.80 as compensatory damages and \$245,500.00 as punitive damages for asbestos-related injuries. Celotex appealed the Edwards Judgment to the United States Court of Appeals for the Fifth Circuit. To stay execution pending appeal, Celotex, as principal, and Northbrook, as surety, issued a bond on May 17, 1989 in the amount of \$294,987.88 (the "Edwards Bond"). Northbrook acted as surety on the Edwards Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Edwards Bond, on May 17, 1989, the Debtors transferred to Northbrook, for the indirect benefit of Edwards, property of the Debtors having a value of \$294,987.88. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

136. Defendants Lloyd D. King and Louan M. King, A.B. Willis and Molly Willis, Cletus Gresham and Gertrude Gresham, Larry Jones and Bess Jones, Johnny Fowler and Anna Fowler and Mary Marble, individually and for the Estate of Albert L. Marble, deceased, Julie Marble Toland, Sheri Marble Nanny, Tina Marble, Bill Marble and Gertrude Westbrook (the "King Group"), were awarded a judgment (the "King Judgment") on April 3, 1989, in the United States District Court, Eastern District of Texas, Marshall Division in the total amount of \$1,043,625.00 as compensatory damages and \$1,550,000.00 as punitive damages for asbestos-related injuries. Individual awards were as follows: Lloyd King, \$55,000.00 compensatory damages and \$125,000.00 punitive damages; Louan King, \$55,000.00 compensatory damages and \$125,000.00 punitive damages; Willis, \$68,750.00 compensatory damages and \$125,000.00 punitive damages; Gresham, \$178,750.00 compensatory damages and \$350,000.00

punitive damages; Jones, \$82,500.00 compensatory damages and \$200,000.00 punitive damages; Fowler, \$68,750.00 compensatory damages and \$125,000.00 punitive damages; and Marble, et al., \$534,875.00 compensatory damages and \$500,000.00 punitive damages. Celotex appealed the King Judgment to the United States Court of Appeals for the Fifth Circuit. To stay execution pending appeal, Celotex, as principal, and Northbrook, as surety, issued a bond on May 17, 1989 in the amount of \$2,963,605.61 (the "King Group Bond"). Northbrook acted as surety on the King Group Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the King Group Bond, on May 17, 1989, the Debtors transferred to Northbrook, for the indirect benefit of the King Group, property of the Debtors having a value of \$2,963,605.61. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

On November 14, 1990, the King Group filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On January 10, 1991, this Court entered its Order Regarding Relief From Stay there modifying the \$362 Stay and the \$105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgment affirmed.

137. Defendant Francis R. McMahon ("McMahon") was awarded a judgment (the "McMahon Judgment") on April 6, 1989, in the United States District Court for the District of Wyoming in the amount of \$113,500.00 as compensatory damages for asbestos-related injuries. Celotex appealed the McMahon Judgment to the United States Court of Appeals for the Tenth

Circuit. To stay execution pending appeal, Celotex, as principal, and Northbrook, as surety, issued a bond on May 5, 1989 in the amount of \$113,500.00 (the "McMahon Bond"). Northbrook acted as surety on the McMahon Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the McMahon Bond, on May 5, 1989, the Debtors transferred to Northbrook, for the indirect benefit of McMahon, property of the Debtors having a value of \$113,500.00. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

On August 6, 1991, McMahon filed with this Court a motion for relief from stay seeking the entry of an order allowing the continuation of the appellate process. On October 4, 1991, this Court entered its Order Regarding Relief From Stay modifying the §362 Stay and the §105 Injunction for the limited purpose of allowing the appeal to proceed to conclusion, including the issuance of appellate decisions and all necessary mandates. The appellate process has been concluded and the judgment affirmed.

138. Defendants George Brown, A. L. Cook and Joann Cook, Walker Peterson and Eloise Peterson, and Oscar Thomley and Verlene Thomley (the "Brown Group") were awarded a judgment (the "Brown Judgment") on February 22, 1990, in the United States District Court for the Southern District of Alabama, Southern Division in the total amount of \$332,100.00 as compensatory damages for asbestos-related injuries. Celotex appealed the Brown Judgment to the United States Court of Appeals for the Ninth circuit. To stay execution pending appeal, Celotex, as principal and National Union, as surety, issued a bond on March 13, 1989 in the amount of \$332,100.00 (the "Brown Group Bond"). As collateral for the issuance of the Brown Group Bond, on March 13, 1989, the Debtors transferred to

National Union, for the indirect benefit of the Brown Group, a security interest in the Debtors' cash previously transferred by the Debtors to the AIG Liquid Assets Pool Account more specifically described in paragraph 175 herein. In June, 1990 Celotex made payment to the Brown Group in full satisfaction of the Brown Judgment.

139. Defendants Daniel Willis and Carolyn Willis, Elwood Hamlet and Lois Hamlet, Vincent Lewis and Ruby Lewis, and Herman Mensing, Jr. and Frances Mensing (the "Willis Group") were awarded a judgment (the "Willis Judgment") on February 1, 1989, in the United States District Court for the Eastern District of Virginia, Norfolk Division, against Celotex and one other defendant in the total amount of \$526,500.00 as compensatory damages for asbestos-related injuries. Individual awards were as follows: Willis, \$46,000.00; Hamlet, \$143,500.00; Lewis, \$96,000.00; and Mensing, \$241,000.00. Celotex appealed the Willis Judgment to the United States Court of Appeals for the Fourth Circuit. To stay execution pending appeal, Celotex, as principal, and Aetna, as surety, issued a bond on March 13, 1989 in the amount of \$600,000.00 (the "Willis Group Bond"). As collateral for the issuance of the Willis Group Bond, on March 13, 1989, the Debtors transferred to Aetna, for the indirect benefit of the Willis Group, a letter of credit secured by a certificate of deposit. The letter of credit and certificate of deposit are more specifically described in paragraph 176 herein.

140. Defendant Robert Cantrell ("Cantrell") was awarded a judgment (the "Cantrell Judgment") on February 9, 1989, in the United States District Court, Southern District of Ohio, Western Division, against Celotex and Carey Canada in the amount of \$950,500.00 as compensatory damages (and \$500,000.00 as punitive damages against Celotex) for asbestos-related injuries. Celotex and Carey Canada appealed the Cantrell Judgment to the United States Court of Appeals for the Sixth Circuit. To stay execution pending appeal, Celotex and Carey Canada, as principals, and Northbrook, as surety, issued a bond on May 3,

1989 in the amount of \$1,498,047.45 (the "Cantrell Bond"). Northbrook acted as surety on the Cantrell Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Cantrell Bond, on May 3, 1989, the Debtors transferred to Northbrook, for the indirect benefit of Cantrell, property of the Debtors having a value of \$1,498,047.45. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

141. Defendant Manuel Lucero ("Lucero") was awarded a judgment (the "Lucero Judgment") on January 20, 1989, in the United States District Court for the District of New Mexico against Celotex and one other defendant in the amount of \$150,000.00 as compensatory damages (and \$35,000.00 as punitive damages against Celotex) for asbestos-related injuries. Celotex' share of the compensatory award was \$105,000.00. Celotex appealed the judgment to the United States Court of Appeals for the Tenth Circuit. To stay execution pending appeal, Celotex, as principal, and Aetna, as surety, issued a bond on March 3, 1989 in the amount of \$217,000.00 (the "Lucero Bond"). As collateral for the issuance of the Lucero Bond, on March 3, 1989, the Debtors transferred to Aetna, for the indirect benefit of Lucero, a letter of credit secured by a certificate of deposit. The letter of credit and certificate of deposit are more specifically described in paragraph 176 herein.

142. Defendants Charles E. Marple and Angelina Marple (the "Marples") were awarded a judgment (the "Marple Judgment") on February 9, 1989, in the United States District Court, Southern District of Ohio, Western Division against Celotex and Carey Canada in the amount of \$982,000.00 as compensatory damages (and \$500,000.00 as punitive damages against Celotex) for asbestos-related injuries. Celotex and Carey Canada appealed the Marple Judgment to the United States

Court of Appeals for the Sixth Circuit. To stay execution pending appeal, Celotex, as principal, and Northbrook, as surety, issued a bond on May 3, 1989 in the amount of \$1,521,384.57 (the "Marple Bond"). Northbrook acted as surety on the Marple Bond pursuant to the Northbrook Agreement between the Debtors and Northbrook more specifically described in paragraphs 168-170 herein. As collateral for the issuance of the Marple Bond, on May 3, 1989, the Debtors transferred to Northbrook, for the indirect benefit of Marple, property of the Debtors having a value of \$1,521,384.57. The Debtors' property that was transferred was in the form of an assignment of certain future insurance proceeds to be paid to the Debtors under the terms of the Northbrook Agreement more specifically described in paragraphs 168-170 herein.

143. Defendants Eddie Rainwater and Gloria Rainwater (the "Rainwaters") were awarded a judgment (the "Rainwater Judgment") on January 17, 1989, in the Superior Court of Washington for King County against Celotex and four other defendants in the total amount of \$1,752,246.63 (including \$496.63 in costs) as compensatory damages for asbestos-related injuries. Celotex' portion of the judgment was \$350,449.33. Celotex appealed the Rainwater Judgment to the Court of Appeals for the State of Washington. To stay execution pending appeal, Celotex, as principal, and Aetna, as surety, issued a bond on March 3, 1989 in the amount of \$438,061.66 (the "Rainwater Bond"). As collateral for the issuance of the Rainwater Bond, on March 3, 1989, the Debtors transferred to Aetna, for the indirect benefit of the Rainwaters, a letter of credit secured by a certificate of deposit. The letter of credit and certificate of deposit are more specifically described in paragraph 176 herein.

The Rainwater Judgment was appealed by one of Celotex' co-defendants, Fibreboard Corporation ("Fibreboard"). On December 17, 1990, the Court of Appeals of the State of Washington reversed the judgment with respect to Fibreboard, and remanded the case for a new trial based on the trial court's

refusal to instruct the jury on the applicable statutes of limitation. The ground upon which the Court of Appeals reversed the judgment as to Fibreboard is applicable to Celotex. Thus, on July 14, 1992, Celotex filed a Motion For Order Modifying Stay As To Rainwaters To Pursue Appeal And Obtain Release Of Supersedeas Bond.

ALLEGATIONS COMMON TO ALL COUNTS

144. Celotex is a manufacturer of building products, including roofing materials, wallboard and certain forms of insulation. Celotex expanded its roofing materials business in 1972 by acquiring the assets of the Panacon Corporation ("Panacon") for a total purchase price of approximately \$72.5 million.

145. Panacon was the successor in interest to the Phillip Carey Manufacturing Company who was also the parent of Carey Canada. Some of the products manufactured by Phillip Carey contained asbestos. Carey Canada mined and milled raw chrysotile asbestos fibers from 1958 until 1986. Panacon and Celotex continued the limited production and distribution of a few asbestos-containing products originally manufactured by Phillip Carey. In addition, Celotex manufactured a few asbestos-containing building products prior to its acquisition of Panacon.

146. Celotex no longer manufactures any asbestos-containing products. Its predecessors' principal asbestos-containing insulation product became asbestos-free nearly twenty-three years ago. Warning labels were placed on asbestos-containing products by Celotex twenty years ago. Celotex ceased production of its last asbestos-containing products, fully encapsulated roofing materials, in 1984 and has neither made nor sold asbestos-containing products since that time.

147. Asbestos has been the subject of state and federal regulation for many years. In 1975, the federal government announced a partial ban on asbestos and in 1990 the Environmental Protection Agency promulgated a total ban on the use of asbestos in certain products.

148. At all times, Celotex acted in conformance with existing knowledge. The products sold by Celotex were in compliance with threshold limit values for exposure to asbestos set by the American Conference of Governmental and Industrial Hygienists.

149. The phenomenon of asbestos-related injury litigation began its growth in the mid 1970s. As a result of its acquisition of Panacon, Celotex was confronted with massive tort litigation of unprecedented proportion for the products which had been manufactured and sold by Panacon and its predecessors prior to their acquisition by Celotex. Carey Canada likewise was required to defend cases involving asbestos related claims.

150. In the early stages of asbestos-related litigation, a typical plaintiff had direct, daily exposure to a product containing asbestos. These plaintiffs worked in plants which manufactured such products or worked as installers of the finished products at jobsites. However, as the litigation grew, plaintiffs included individuals whose proximity and exposure to asbestos containing materials was secondary, including plumbers, electricians, carpenters and others in the construction trades. As the landslide of litigation continued, plaintiffs included individuals who claims to have suffered asbestos-related injuries by working in a building where the finished product had been installed years before as well as individuals whose only exposure to the product was washing a worker's clothing.

151. Numerous issues arose as the number of cases substantially increased. Multiple defendants were usually named in each suit, including miners, millers, processors, producers, sellers, distributors and contractors. Many defendants were dismissed at the motion stages of a proceeding when the plaintiff could not show any actual exposure to that particular defendant's products. However, many defendants were willing to settle lawsuits for nominal amounts which encouraged other plaintiffs to assert a barrage of claims.

152. Virtually all of the asbestos-related bodily injury actions filed against the Debtors involved the same allegations and arose from the same course of conduct, i.e., the manufacture and sale of asbestos-containing materials by Celotex and/or its predecessors. Many of the trials included the same witnesses and the same deposition testimony on liability issues. The same law firms represented substantial numbers of the plaintiffs. The claims ordinarily alleged that the products were defective and unreasonably dangerous because the Debtors failed to warn the plaintiffs of the potential dangers of prolonged exposure to asbestos. The plaintiffs typically alleged that, as a result of exposure to asbestos products manufactured and distributed by the Debtors, they developed diseases such as asbestosis, mesothelioma, lung cancer, other cancers, and pleural changes. The plaintiffs' punitive damages cases primarily centered on the knowledge of asbestos hazards allegedly held by or available to Celotex' predecessors during the period prior to Celotex' 1972 acquisition of Panacon.

153. In cases that were not settled, the Debtors denied the core allegations of the typical claim and defended against the punitive damage claims based on federal and state constitutional law, state statutory or common law, and on public policy grounds. The Debtors argued that they should not be assessed punitive damages for the action of a predecessor company over which they had no control. The Debtors also argued that repeated punitive damage awards in asbestos litigation did not serve the rationale of punishment or deterrence, defeated the purpose of punitive damages, threatened the ability of future claimants to receive compensatory damages for their actual injuries and were therefore against public policy and the public interest. The Debtors argued further that fundamental fairness and due process limit the number of times a defendant may be required to pay punitive damages for the same conduct. Additionally, the Debtors asserted that due process was violated where there were no objective limits on the jury's discretion in awarding punitive damages and no objective and meaningful

standards of review to consider the excessiveness of such awards. Finally, the Debtors argued that the awards were excessive and per se unreasonable in violation of applicable federal and state constitutions.

154. By 1980, the number of asbestos related cases against the Debtors totalled approximately 5,000. For the next three years, however, the number of pending actions against the Debtors increased by approximately 5,000 a year. In 1985 and 1986, the number of pending actions increased by approximately 10,000 a year. During the subsequent four years, the number increased by approximately 25,000 claims a year. By the Petition Date, approximately 100,000 claims were pending against Celotex and over 39,000 claims were pending against Carey Canada in various state and federal courts. The vast majority of these cases include claims for punitive damages.

155. Prior to the inception of the Asbestos Claims Facility (the "ACF") in late 1985, the Debtors or their primary insurance carriers managed the asbestos bodily injury litigation. The ACF was formed in the Fall of 1985 as part of an agreement commonly known as the Wellington Agreement. The Wellington Agreement was an effort, in part, by a group of approximately 30 companies named as defendants in asbestos litigation, as well as many of their insurance companies, to establish a comprehensive mechanism to reduce the vast costs associated with defending the voluminous asbestos-related disease claims. The Debtors were members of the ACF from its inception. The ACF managed cases on behalf of its members, including the Debtors, from the Fall of 1985 until September 1, 1988. The ACF was not successful in achieving its objectives and was dissolved. Subsequent to September 1, 1988 and through and until the Petition Date, Celotex and Carey Canada resumed management of the asbestos-related bodily injury claims against them.

156. The Debtors funded the settlement and defense costs associated with the asbestos related litigation primarily from

available insurance proceeds. However, the insurance companies nearly always disputed coverage. The Debtors' inability to continue to resolve disputes and obtain insurance proceeds at a sufficient rate to fund the enormous costs associated with the massive asbestos related litigation forced Celotex and Carey Canada to seek this Court's protection.

157. As of the Petition Date, the Debtors and their insurance carriers paid approximately \$360,000,000.00 to settle asbestos-bodily injury claims and incurred defense costs through October 12, 1990 of approximately \$195,000,000.00. Thus, the Debtors and their insurance carriers have spent over a half billion dollars to address asbestos related claims over the past two decades. In addition, by the Petition Date, approximately 500 cases had proceeded to a plaintiff's verdict but had not yet been resolved. These verdicts totalled approximately \$96,000,000.00.

158. While awards of punitive damages were rare early in the litigation, they increased substantially immediately prior to the Petition Date. Of the almost 50,000 claims disposed of prior to the Debtors' Chapter 11 petitions, only nine, or less than one in 5,000, included a payment of punitive damages, although asbestos related litigation had been underway for more than 15 years.

159. The entry of an award of punitive damages was a fortuity and a windfall for those few plaintiffs receiving them. As of the Petition Date, punitive damage awards were pending against the Debtors in favor of 96 plaintiffs totally approximately \$30,000,000.00. The current punitive damage award portion of claims by Bonded Claimants totals \$13,052,406.67 against Celotex and \$89,000.00 against Carey Canada.

160. From state to state, the range of trial mechanisms ran from the traditional single plaintiff case tried on all issues to a single jury, to mass consolidations of 300 to 3,000 plaintiffs' cases bifurcated or trifurcated with issues of liability and punitive

damages being tried to single or multiple juries followed by subsequent group trials of eight to twelve individual plaintiffs to determine damage awards.

161. In West Virginia and Texas, the two jurisdictions which implemented mass consolidation procedures, the trial courts authorized imposition of punitive liabilities against the Debtors on an assembly line basis, as a "multiplier" of compensatory damage awards which had not yet been assessed. For example, in *Cimino v. Raymark Industries, Inc.*, 751 F.Supp. 649 (E.D. Tex. 1990), the court assessed a multiplier which would render the punitive award equal to 200% of Celotex' share of the compensatory award. Further, in a group of West Virginia cases, the amount of punitive damages awarded against Celotex equaled 300% of the amount of compensatory damages awarded, while against Carey Canada, it equaled only 13.5% of the amount of the compensatory damages awarded, even though the evidence against both companies was substantially identical. The filing of the bankruptcy petitions prevented completion of these cases against the Debtors. The capriciousness of punitive awards is demonstrated by the results in the case of *Glasscock et al. v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991) cert. denied, 112 S.Ct. 1778, 118 L.Ed. 2d 435 (1992). The punitive to compensatory ratios ranged from 7:1 to 200:1 for the various plaintiffs therein, despite the fact that each plaintiff who claimed to have been exposed to asbestos products manufactured by Celotex had similar relationships with Celotex. The amounts of the punitive awards bore no relationship to the actual damages awarded.

162. Moreover, in both West Virginia and Texas, every class member would have been awarded a share of the punitive damages verdict, even though prior individual trials in these states frequently resulted in juries declining to award punitive damages. In some instances two to ten cases were consolidated based on similar diseases or similar exposures, while in other instances, cases were consolidated based on nothing more than

being the next cases on the trial docket. The dissimilar trial procedures and varying awards of punitive damages among states underscore the tremendous inconsistencies surrounding the compensatory and punitive damage claims asserted against the Debtors.

163. In addition, although essentially the same issues were presented in each case against Celotex and Carey Canada, different courts reached different conclusions on these issues. For example, in *the matter of William A. Angotti*, Circuit Court, Jackson County, Missouri, judgment was entered against Celotex in favor of William A. Angotti in the amount of \$189,500.00 in compensatory damages and \$250,000.00 in punitive damages. The Missouri Court of Appeals, Western District, reversed the award of punitive damages to Mr. Angotti. The court found that the evidence did not show that Celotex had been put on notice of the fact that relevant information regarding the dangerousness of asbestos was available to show that the product was actually known to constitute a health hazard to a given class of individuals. Further, it found that Celotex did not consciously choose to ignore the available information. By contrast, in *William Earl Glasscock, et al. v. The Celotex Corporation*, U.S. District Court, Eastern District of Texas, the jury assessed and the court awarded punitive damages totalling \$6,100,000.00 in favor of eleven plaintiffs that had been awarded a total of \$317,625.00 in compensatory damages. The United States Court of Appeals, Fifth Circuit, found that Celotex succeeded to the liabilities of its predecessors, and refused to overturn a jury verdict that Celotex was willful or reckless with regard to the production or distribution of asbestos.

164. Even in actions filed against Celotex or Carey Canada in the same court during a similar time period, punitive damages, when awarded, differed substantially. For example, in cases filed in the U.S. District Court for the Eastern District of Texas in 1985, punitive damage awards against Celotex ranged from \$125,000.00 to \$600,000.00. Similarly, in cases filed in the

Circuit Court, Kanawha County, West Virginia, in 1984 and 1985, punitive damage awards against Celotex ranged from \$26,499.00 to \$231,673.00 while in cases filed in the Circuit Court, Putnam County, West Virginia in 1989, punitive damage awards ranged from \$366,900.00 to \$1,236,000.00. This example graphically demonstrates the lack of objective standards in punitive damage awards arising out of identical circumstances.

165. Most of the expenses and liabilities incurred by the Debtors in connection with the asbestos bodily injury litigation were paid or reimbursed by insurance carriers pursuant to their insurance policies or settlement agreements between the Debtors and those carriers. However, (1) policy limits were relatively low in early years and the limits of most policies prior to late 1977 have been exhausted, (2) since late 1977, most of the Debtors' policies have excluded coverage for the disease of asbestosis, which is the basis for many of the personal injury claims pending against the Debtors, and the Debtors and the insurers dispute the scope of these exclusions, (3) subsequent to late 1977, an increasing number of the Debtors' policies have excluded coverage for other asbestos-related diseases, and the Debtors and their insurers dispute the scope of these exclusions, (4) since late 1984, coverage for most asbestos-related personal injury and property damage claims have been excluded from the Debtors' policies, (5) the Debtors' insurers dispute whether any of the Debtors' policies cover asbestos-related property damage claims, and (6) no insurance is available for punitive damages in many jurisdictions.

166. Consequently, the Debtors are unable to estimate the amount of additional insurance coverage available for pending and future asbestos-related claims. Shortly after the Debtors filed their Chapter 11 petitions, the Debtors commenced an Omnibus Insurance Adversary Proceeding seeking a declaratory judgment concerning the obligations of the Debtors' insurance companies to defend the Debtors and to pay the Debtors' defense costs and liability in actions alleging (1) asbestos property damage; (2) environmental property damage and bodily injury

allegedly arising from environmental property damage; and (3) asbestos bodily injury. The Debtors also seek in the Omnibus Insurance Adversary Proceeding damages for the insurance companies' breaches of their contractual obligations to protect the Debtors, and certain extra-contractual relief.

167. The Debtors have agreements with five different insurance carriers concerning the issuance of supersedeas bonds. All of the Bonds are collateralized by insurance proceeds belonging to the Debtors, either in the form of cash from insurance proceeds already received or in the form of committed insurance proceeds to be paid at specified dates pursuant to separate settlement agreements ("Settlement Agreements") with insurance companies resolving disputes involving coverage for asbestos-related claims. The Bonds that were collateralized by insurance proceeds to be paid at specified dates were issued pursuant to Settlement Agreements with California Union, Home, and Northbrook. California Union arranged for Bonds to be issued by its affiliate, INA; Northbrook issued Bonds itself or arranged for Bonds to be issued by its affiliate, Allstate; Home arranged for Bonds to be issued by its wholly-owned subsidiary, Home Indemnity. The Bonds secured by cash from insurance proceeds were issued by Aetna and National Union.

168. On May 1, 1989, Celotex and Carey Canada entered into a settlement agreement (hereinafter the "Northbrook Agreement") with respect to four excess insurance policies. The policies involved were Northbrook policy no. 63-003-744 issued for the policy period of October 1, 1977, to October 1, 1978, with annual aggregate limits of products liability coverage (bodily injury and property damage combined), in the amount of \$20,000,000; Northbrook policy no. 63-005-051 issued for the policy period of October 1, 1978, to October 1, 1979, with annual aggregate limits of products liability coverage (bodily injury and property damage combined) in the amount of \$5,000,000; Northbrook policy no. 63-006-044 issued for the policy period of October 1, 1979, to October 1, 1980, with aggregate annual

limits of products liability coverage (bodily injury and property damage combined) in the amount of \$5,000,000; and Northbrook policy no. 63-007-156 issued for the policy period October 1, 1981, to October 1, 1982, with aggregate annual limits of products liability coverage (bodily injury and property damage combined) in the amount of \$15,000,000. These policies included asbestos-related exclusions, the scope of which were disputed.

169. Under the terms of the Northbrook Agreement, Northbrook agreed to pay Celotex and Carey Canada in scheduled periodic payments the total of \$38,250,000 to be utilized for the defense or indemnity of certain claims. The initial installment payment under the Northbrook Agreement was not due until January 1, 1990. The total remaining amount to be paid under the Northbrook Agreement is \$22,402,568. As of June 29, 1992, the total payments deferred due to the issuance of supersedeas bonds under the Northbrook Agreement are \$14,152,568. Future payments of \$3,000,000 each are due on July 1, 1992 and October 1, 1992 and payments of \$750,000 each are due on January 1, 1993, April 1, 1993 and July 1, 1993.

170. The Northbrook Agreement also provided that, if during the pendency of and subject to the terms of the Northbrook Agreement, Celotex or Carey Canada was obligated to post a bond to supersede a judgment against it, Northbrook would, upon request, issue the supersedeas bond as surety on appeal of the judgment. The principal amount of the supersedeas bond was to be fully secured by payments remaining to be made by Northbrook under the Northbrook Agreement.

171. On or about May 21, 1990, Celotex and Carey Canada entered into a settlement agreement (hereinafter the "California Union Agreement") with respect to California Union Insurance Company excess certificates/policies ZCX-00-38-11 and ZCX-00-46-33 with total aggregate limits of products liability coverage (bodily injury and property damage combined) in the amount of \$20,000,000.00. These policies include asbestos-

related exclusions, the scope of which were disputed. Under the terms of the California Union Agreement, California Union agreed to pay Celotex and Carey Canada in scheduled periodic payments the total amount of \$20,000,000 to be utilized for the defense or indemnity of certain claims. The initial installment payment under the California Union Agreement was not due until August 1, 1990. The total remaining amount to be paid under the California Union Agreement is \$12,500,000. As of June 29, 1992, the total payments deferred due to the issuance of Bonds under the California Union Agreement are \$7,283,128. One future payment of \$5,000,000 is due on March 31, 1994.

172. The California Union Agreement also provided that, if during the pendency of and subject to the terms of the California Union Agreement, Celotex or Carey Canada was obligated to post a bond to supersede a judgment against it, California Union would, upon request, provide or obtain the supersedeas bond as surety on appeal of the judgment. The principal amount of the supersedeas bond was to be fully secured by payments remaining to be made by California Union under the California Union Agreement.

173. On August 31, 1989, Celotex and Carey Canada entered into a final settlement agreement (the "Home Agreement") with respect to eight excess liability insurance policies. The policies involved were HEC9557890, HEC9006511, HEC9328531, HEC9006512, HEC9328530, HEC9631289, HEC9631290, and HEC9690480. Some of these policies include asbestos-related exclusions, the scope of which were disputed. Under the terms of the Home Agreement, Home agreed to pay Celotex and Carey Canada in scheduled periodic payments the total amount of \$32.75 million to be utilized for the defense or indemnity of certain claims. The total amount remaining to be paid under the Home Agreement is \$12,750,000, all of which are deferred due to the issuance of supersedeas bonds.

174. The Home Agreement also provided that, if during the pendency of and subject to the terms of the Home Agreement, Celotex or Carey Canada was obligated to post a bond to supersede a judgment against it, Home would, upon request, obtain or provide the supersedeas bond as surety on appeal of the judgment. The principal amount of the supersedeas bond was to be fully secured by payments remaining to be made by Home under the Home Agreement.

175. National Union issued Bonds secured by a collateral account established by the Debtors with cash received from the settlement of disputes involving coverage including coverage for asbestos-related claims. The Debtors transferred cash to the AIG Liquid Assets Pool Account under Account Number L12280-1 at Chemical Bank, New York, New York. This is a separate and distinct account established to serve as collateral for surety bonds issued by National Union for the Debtors. Each Bond issued by National Union is secured by the collateral account. The account balance as of May 31, 1992, was \$13,518,952.76. The estimated account balance as of June 29, 1992, is \$13,556,546.62. The interest rate on the funds deposited in the collateral account is based on the 90 day Treasury Bill rate less 25 basis points, adjusted monthly. The average daily interest earnings on the collateral account during the preceding six months is \$1,337.26.

176. Aetna issued Bonds secured by a letter of credit obtained by the Debtors using certificates of deposit purchased with cash already received from the settlement of insurance disputes involving coverage including coverage for asbestos-related claims as collateral. First Florida Bank, N.A., Tampa, Florida, issued the letter of credit in favor of Aetna based upon the Debtors' pledge to First Florida Bank, N.A. of certificates of deposit which the Debtors purchased in amounts equal to or greater than the face amount of the letter of credit. The amount of the letter of credit issued by First Florida Bank, N.A., is \$1,256,000. Certificate of Deposit No. 7046261010 in the amount of \$1,256,000 issued by First Florida Bank, N.A., secures the letter of credit.

177. The Debtors transferred their property in the form of (a) an assignment of their right to receive certain future insurance proceeds, or (b) cash received in payment of resolved insurance coverage for asbestos-related claims to obtain the Bonds. The Bonded Claimants are the indirect beneficiaries of these transfers of the Debtors' property. Claimants holding verdicts as to which no Bond was posted hold punitive damage awards against Celotex totaling \$1,355,000, and against Carey Canada totaling \$85,000.

178. All of the judgments rendered against the Debtors that were unpaid as of the Petition Date remain unpaid, even if a supersedeas bond has been posted pending an appeal of a particular suit. Even if final mandate has issued, a Bond cannot be executed upon absent this Court's approval.

179. The Debtors' assets totaling more than \$61 million obtained from settlements of disputed insurance coverage were used to post the Bonds during the 15 month period prior to the filing of their bankruptcy petition. These assets presently represent more than 80% of the insurance assets committed and available for distribution to Bodily Injury Claimants and property damage claimants. It is highly improbable that the unbonded claimants, although identically situated with the Bonded Claimants, will receive full payment in satisfaction of their awards in the Debtors' reorganization.

180. There are also Bodily Injury Claimants in whose cases verdicts have been rendered, but no judgment has been entered. It is also improbable that these claimants will receive payment in full in the Debtors' reorganization.

181. Further, there are more than 5,000 asbestos claimants who settled their disputes with Celotex or Carey Canada, but whose settlements were not funded because of the filing of the Chapter 11 petition. Payment to these settling claimants was precluded by the bankruptcy filing and they will receive only a ratable share of their claim in common with all other claimants.

182. There are additional plaintiffs who have asserted claims against the Debtors, but whose cases are in the pre-verdict stage of litigation.

183. Finally, there may be countless future claimants, who may at some future date, as a result of alleged exposure to asbestos, seek to prosecute actions against the Debtors.

184. The Debtors expect, under the protection of this Court, to be able to resolve their remaining insurance coverage disputes and to develop a reorganization plan or plans which will permit a fair and equitable payment of its current and future asbestos related obligations, as well as a satisfaction of other creditors' claims. The Chapter 11 filing was undertaken to permit the Debtors to continue their business under the protection of the Bankruptcy Court while they restructure their obligations to their creditors and develop a plan to deal with the asbestos related claims.

COUNT I

ACTION TO AVOID PREFERENTIAL TRANSFERS (11 U.S.C. §547(b))

185. The Plaintiffs reallege and incorporate paragraphs 1 through 184, above, as if fully set forth herein.

186. Section 547(b) of the Code provides that a debtor may avoid any transfer of an interest of the debtor in property if such transfer: (a) is to or for the benefit of a creditor, (b) is made

on account of an antecedent debt owed by the debtor before such transfer was made, (c) is made while the debtor was insolvent, (d) is made on or within 90 days before the date of the filing of the petition, and (e) enables the creditors to receive more than such creditor would receive under a liquidation proceeding pursuant to Chapter 7 of the Code.

187. The Debtors transferred property for the benefit of the Preference Defendants consisting of the collateral used to induce the issuance of the Bonds in favor of the Preference Defendants. Specifically, cash or cash equivalents, or the right to receive future insurance proceeds under a Settlement Agreement, was transferred to each Surety issuing a Bond in favor of a Preference Defendant.

188. The Debtors transferred their interest in property to the Sureties as collateral in order to secure the issuance of Bonds in favor of the Preference Defendants.

189. The transfers of the Debtors' property to the Sureties were for the sole benefit of the Preference Defendants.

190. The transfers of the Debtors' property occurred for and on account of antecedent debts owed by the Debtors to the Preference Defendants for bodily injury or wrongful death arising from exposure to asbestos or asbestos containing products which claims were liquidated by the award of judgments in favor of the Preference Defendants against the Debtors.

191. The transfers for the benefit of the Preference Defendants were made on or within 90 days of the Petition Date. Specifically, the transfers occurred on or between July 13, 1990 and October 12, 1990.

192. Pursuant to §547(f) of the Code, the Debtors are presumed to have been insolvent at the time the Debtors transferred the property for the benefit of the Preference Defendants.

193. The transfer of property by the Debtors for the benefit of the Preference Defendants in connection with the issuance of the Bonds enabled the Preference Defendants to receive more than they would have received if the Debtors' Chapter 11 case were a case under Chapter 7 of the Code and the Preference Defendants received distributions from the Debtors on the Debtors' indebtedness to the Preference Defendants to the extent provided by the provisions of the Code.

WHEREFORE, the Debtors demanded judgement against the Preference Defendants (i) determining that the transfers of property of the Debtors in order to cause the issuance of the Bonds in favor of the Preference Defendants constituted transfers that are voidable under §547(b) of the Code, (ii) determining that the Debtors may recover the property transferred for the benefit of the Preference Defendants in connection with the issuance of the Bonds from the Preference Defendants pursuant to §550(a) of the Code, and (iii) granting to the Debtors such other and further relief as is just.

COUNT II

ACTION TO AVOID TRANSFERS TO SURETIES AND TO DISCHARGE CERTAIN OBLIGATIONS OF SURETIES (11 U.S.C. §547(d))

194. The Plaintiffs reallege and incorporate paragraphs 1 through 193 above, as if fully set forth herein.

195. Section 547(d) of the Code and Bankruptcy Rule 6010 permit a debtor to avoid a transfer of an interest in property of the debtor transferred to a surety to secure reimbursement of the surety, if the surety who issued the bond furnished the bond in order to dissolve a judicial lien that would have been avoidable by the debtor under §547(b) of the Code, subject to the sureties' rights under §547(d).

196. The Debtors transferred interests in property to the Sureties as collateral in the form of cash or cash equivalents or the assignment of rights to receive future insurance proceeds as collateral to secure reimbursement of the Sureties that furnished Bonds in favor of the Preference Defendants.

197. Upon issuance of the Bonds, the Debtors dissolved the judicial liens obtained in favor of the Preference Defendants.

198. The judicial liens arising from the judgments in favor of the Preference Defendants, had they been executed, are avoidable under §547(b) of the Code.

199. To the extent of the value of the transferred property recovered by the Debtors the Sureties should be discharged from liability under the Bonds issued in favor of the Preference Defendants.

WHEREFORE, the Debtors demand judgment against the Preference Defendants (i) determining that the transfers of property of the Debtors to the Sureties induced issuance of the Bonds in order to dissolve judicial liens in favor of the Preference Defendants that are voidable by the Debtors under §547(b) of the Code; (ii) determining that the Sureties are discharged from liability under the Bonds issued in favor of the Preference Defendants to the extent provided in §547(d); and (iii) granting to the Debtors such other and further relief as is just.

COUNT III

ACTION TO AVOID CONSTRUCTIVELY FRAUDULENT TRANSFERS (11 U.S.C. §548(a)(2)(A))

200. The Plaintiffs reallege and incorporate paragraphs 1 through 184 above, as if fully set forth herein.

201. Section 548(a)(2)(A) of the Code provides that a debtor may avoid any transfer of an interest of the debtor in property if the debtor (a) received less than a reasonably equivalent value in exchange for such transfer; (b) was insolvent on the date of the transfer, became insolvent as a result of the transfer or intended to incur, or believed that it would incur, debts that would be beyond the debtor's ability to pay such debts matured; and (c) the transfer occurred within one year of the filing of the bankruptcy petition.

202. The Debtors transferred property for the benefit of the One Year Defendants on the dates set forth in paragraphs 21 through 117 above, consisting of the collateral used to induce the issuance of its Bonds in favor of the One Year Defendants. Specifically, cash or cash equivalents, or the right to receive future insurance proceeds under a Settlement Agreement was transferred to each Surety issuing a Bond in favor of a One Year Defendant.

203. The Debtors transferred their interest in property to the Sureties as collateral in order to secure the issuance of Bonds in favor of the One Year Defendants.

204. The transfers of the Debtors' property to the Sureties were for the sole benefit of the One Year Defendants.

205. The transfers of the Debtors' property for the benefit of the One Year Defendants were all made within one year of the Petition Date.

206. The Debtors did not receive reasonably equivalent value for the transfers of the Debtors' property for the benefit of the One Year Defendants because the forbearance of the right to execute and levy by the One Year Defendants did not place the Debtors in any better position financially than if the Debtors had paid the judgments at the time of the transfers. The immediate economic impact experienced by the Debtors as a result of

posting the Bonds, in a balance sheet sense, was the same as if they had paid the One Year Defendants on the date of their judgments. Accordingly, no value was received by the Debtors.

207. Under the unique circumstances associated with the financial affairs of the Debtors, the Debtors should be deemed for purposes of this avoidance action under the Code to have been insolvent or to have believed that the Debtors would incur debts that would be beyond their ability to pay as such debts matured at the time of the transfers for the benefit of the One Year Defendants.

WHEREFORE, the Debtors demand judgment against the One Year Defendants (i) determining that the transfers of property of the Debtors for the benefit of the One Year Defendants in order to cause the issuance of the Bonds in favor of the One Year Defendants constitute transfers that are voidable under §548(a)(2)(A) of the Code; (ii) determining that the Debtors may recover the proceeds of the transfers from the One Year Defendants pursuant to §550(a) of the Code; and (iii) granting to the Debtors such other and further relief as is just.

COUNT IV

ACTION TO AVOID CONSTRUCTIVELY FRAUDULENT TRANSFERS (11 U.S.C. §544 and §726.105, Florida Statutes)

208. The Plaintiffs reallege and incorporate paragraphs 1 through 184, and 201 through 207, above, as if fully set forth herein.

209. Pursuant to §544 of the Code, any transfer of an interest of a debtor that is voidable under state law by a creditor holding an allowable claim may be avoided by the debtor.

210. A transfer may be avoided by a creditor holding an allowable claim under the Uniform Fraudulent Transfer Act, and specifically §726.105, *Florida Statutes* (1991), if it was made by the debtor within four years of the date of the action, if the debtor received less than reasonably equivalent value, and if the debtor believed or reasonably should have believed that he would incur debts beyond his ability to pay as they became due.

211. The Debtors transferred property for the benefit of all Bonded Claimants consisting of the collateral used to induce the issuance of the Bonds in favor of the Bonded Claimants. Specifically, cash or cash equivalents, or the right to receive future insurance proceeds under a Settlement Agreement was transferred to each Surety issuing a Bond in favor of a Bonded Claimant.

212. The Debtors transferred their interest in property to the Sureties as collateral in order to secure the issuance of Bonds in favor of the Bonded Claimants.

213. The transfers of the Debtors' property to the Sureties were for the sole benefit of the Bonded Claimants.

214. The transfers of the Debtors' property for the benefit of the Bonded Claimants were made within four years of the Petition Date.

215. The Debtors did not receive reasonably equivalent value for the transfers in favor of the benefit of the Bonded Claimants.

216. Under the unique circumstances associated with the financial affairs of the Debtors, the Debtors should be deemed for purposes of this avoidance action under the Uniform Fraudulent Transfer Act to have believed or reasonably should have believed that they would incur debts beyond their ability to pay as they become due.

WHEREFORE, the Debtors demand judgment against the Bonded Claimants (i) determining that the transfers of property of the Debtors for the benefit of the Bonded Claimants in order to cause the issuance of the Bonds in favor of the Bonded Claimants constitute transfers that are voidable under the Uniform Fraudulent Transfer Act; (ii) determining that the Debtors may recover the proceeds of the transfers from the Bonded Claimants pursuant to §550(a) of the Code; and (iii) granting to the Debtors such other and further relief as is just.

COUNT V

RECOVERY OF PREFERENTIAL AND CONSTRUCTIVELY FRAUDULENT TRANSFERS

217. The Plaintiffs reallege and incorporate paragraphs 1 through 216 above, as if fully set forth herein.

218. Section 550 of the Code provides that property transferred pursuant to a transfer that is avoided may be recovered from the initial transferee of such property.

219. The Sureties are the initial transferees of the property transferred by the Debtors for the benefit of the Bonded Claimants, and in fact, are in possession of this property.

220. Because the Transfers made for the benefit of the Bonded Claimants are voidable as preferential and constructively fraudulent pursuant to §§544, 547 and 548 of the Code, the Debtors may recover this property from the Sureties.

WHEREFORE, the Debtors demand judgment against the Sureties (i) determining that they are the initial transferee of transfers for the benefit of the Bonded Claimants that are voidable under §§544, 547 and 548 of the Code; (ii) determining that the Debtors may recover the proceeds of the transfers from

the Sureties pursuant to §550(a) of the Code; and (iii) granting to the Debtors such other and further relief as is just.

NOTE: Count VI and the allegations of paragraphs 221 through 226 have been dismissed with prejudice by the Bankruptcy Court.

COUNT VII

ACTION FOR DECLARATORY JUDGMENT DISALLOWING PUNITIVE DAMAGE AWARDS (11 U.S.C. §502)

221. The Plaintiffs reallege and incorporate paragraphs 1 through 226 above, as if fully set forth herein.

222. The defendants in this count of the Complaint include all of the defendants named in paragraphs 51 through 54, paragraphs 102 through 115, and paragraphs 134 through 139, above (collectively the "Punitive Damage Claimants").

223. The Bonded Claimants hold punitive damages awards of \$13,052,406.67 against Celotex, and \$89,000 against Carey Canada.

224. Section 105(a) of the Code provides, in part, that a court may "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." This Court therefore has the authority to issue a declaratory judgment.

225. Section 502 of the Code provides that a court may allow or disallow, in full or in part, the claim or interest of any creditor. This Court therefore has the authority to disallow punitive damage awards.

226. Failure to disallow punitive damage awards would frustrate and impede the Debtors' reorganization. Limited resources would be diverted to a small group of creditors to the detriment of other creditors, including compensatory damage claimants. Issues central to the Debtors' reorganization would not be decided in the bankruptcy forum, thereby limiting this Court's exclusive responsibility and authority to manage these proceedings effectively.

227. Punitive damages are not intended to compensate an injured plaintiff, but rather are intended to punish a defendant and deter him and others from similar conduct. It is undisputed, however, that the Debtors have ceased producing any asbestos containing products, including those products which precipitated the lawsuits that necessitated the Debtors' resort to the protection of this Court. Therefore, the disallowance of the punitive damage claims will not frustrate the goal of deterrence. The goal of punishment, especially for the acts of a predecessor over which Celotex had no control, was achieved long ago.

228. Fundamental fairness and due process limit the number of times a defendant may be required to pay punitive damages for the same conduct. Due process is violated where there are no objective limits on the jury's discretion in awarding punitive damages and no objective and meaningful standards of review to consider the excessiveness of the punitive damage awards. The punitive damage awards at issues in this Complaint are also excessive and per se unreasonable.

WHEREFORE, the Debtors demand a judgment against the Punitive Damage Claimants (i) determining that the punitive damage portions of their claims against the Debtors are disallowed; and (ii) granting to the Debtors such other and further relief as is just.

COUNT VIII

**ACTION TO EQUITABLY SUBORDINATE
PENDING PUNITIVE DAMAGE
AWARDS TO THE CLAIMS OF
UNSECURED CREDITORS
(11 U.S.C. §510(c)(1))**

229. The Plaintiffs reallege and incorporate paragraphs 1 through 234 above, as if fully set forth herein.

230. The Defendants in this count of the Complaint include all of the Punitive Damage Claimants.

231. Section 510(c)(1) of the Code provides that "under principles of equitable subordination, the court may subordinate, for purposes of distribution, all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest." This Court therefore has the authority to subordinate punitive damage awards to the claims of unsecured creditors.

232. Failure to subordinate punitive damage awards would frustrate and impede the Debtor's reorganization. Limited resources would be diverted to a small group of creditors to the detriment of other creditors including compensatory damage claimants. Issues central to the Debtors' reorganization would not be decided in the bankruptcy forum, thereby limiting this Court's exclusive responsibility and authority to manage these proceedings effectively.

WHEREFORE, the Debtors demand judgment against the Punitive Damage Claimants (i) determining that the punitive damage portions of their claims against the Debtors are subordinated to the claims of all unsecured creditors; and (ii) granting to the Debtors such other and further relief as is just.

COUNT IX

**ACTION FOR DECLARATORY JUDGMENT
DISALLOWING POST-PETITION INTEREST
AND UNMATURED INTEREST
(11 U.S.C. §502)**

233. The Plaintiffs reallege and incorporate paragraphs 1 through 238 above, as if fully set forth herein.

234. Section 105(a) of the Code provides, in part, that a court may "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." This Court therefore has the authority to issue a declaratory judgment.

235. Section 502 of the Code provides that a court may allow or disallow, in full or in part, the claim or interest of any creditor. This Court therefore has the authority to disallow post-petition interest and unmatured interest on the Bonded Claimants' claims.

236. The claims of the Bonded Claimants against the Debtors are unsecured and therefore those claims are not entitled to receive any interest accrued since the Petition Date.

237. Any claim against a Bond, for an amount that reflects an excess above the amount of the Bonded Claimant's claim against the Debtors as of the Petition Date, represents a claim for unmatured interest.

238. Section 502(b)(2) of the Code provides that a court shall disallow any claim for unmatured interest.

239. Failure to disallow post-petition interest on the Bonded Claimants' claims against the Debtors and to disallow any claim against a Bond for unmatured interest would frustrate and impede the Debtors' reorganization.

WHEREFORE, the Debtors demand judgment against the Bonded Claimants (i) determining that any claim for post-petition interest against the Debtors is disallowed; (ii) determining that any claim against a Bond, for an amount in excess of the Bonded Claimants' claim against the Debtors as of the Petition Date, represents a claim for unmatured interest against the Debtors which is disallowed pursuant to Section 502(b)(2) of the Code; and (iii) granting to the Debtors such other and further relief as is just.

COUNT X

ACTION FOR DECLARATORY JUDGMENT DISALLOWING POST-PETITION BOND PREMIUMS (11 U.S.C. §503(b))

240. The Plaintiffs reallege and incorporate paragraphs 1 through 245 above, as if fully set forth herein.

241. The defendants in this count of the Complaint include all of the Sureties.

242. Section 503(b)(1)(A) of the Code provides, in part, that there shall be allowed administrative expenses including the actual, necessary costs and expenses of preserving the estate, for services rendered after the commencement of the case.

243. Several of the Sureties have sent bills and made requests to the Debtors to pay additional annual premiums in connection with the pre-petition posting of the Bonds (the "Bond Premiums").

244. The claimed post-petition Bond Premiums are not actual, necessary costs and expenses of preserving the estate and do not represent an actual cost for services rendered after the commencement of the case.

245. Once the Bonds were posted by the Sureties for the benefit of the Bonded Claimants they remained posted regardless of the payment or non-payment of any subsequent Bond Premiums.

246. The Debtors should not be required to pay post-petition Bond Premiums which relate to the pre-petition posting of the Bonds, and therefore are not expenses incurred to preserve the estate or for services rendered after the commencement of the case.

247. The automatic stay pursuant to §362 of the Code, the §105 Stay Order and other Orders of the Court have protected the Debtors from the Bond Premiums and no new benefit has been derived for the estate as a result of the outstanding Bonds.

WHEREFORE, the Debtors demand judgment against the Sureties (i) determining that post-petition Bond Premiums to the Sureties are not obligations of the Debtors and are not entitled to treatment as administrative expenses of the Debtors' estates; and (ii) granting to the Debtors such other and further relief as is just.

COUNT XI

ACTION TO ENJOIN CERTAIN CLAIMS AGAINST SURETIES (11 U.S.C. §105)

248. The Plaintiffs reallege and incorporate paragraphs 1 through 253 above, as if fully set forth herein.

249. Section 105 of the Code permits the Bankruptcy Court to issue any order, process or judgment that is necessary or appropriate, including the power to issue an order channeling claims that may exist against the Sureties for issuing the Bonds to the property transferred to the Sureties which is recovered by the Debtors pursuant to §550 of the Code.

250. Further, the Court's authority to channel claims is granted by implication under to the Court's general equitable powers, even absent statutory provisions.

251. If the Bonded Claimants are not precluded from pursuing possible claims against the Sureties with respect to the obligations of the Sureties on the Bonds, then the Sureties will have rights of indemnity or contribution against the Debtors, or may otherwise seek to avoid, set off or recoup the obligations of the Sureties under their Settlement Agreements with the Debtors or exercise rights as secured creditors against the Debtors, and thereby deplete the Debtors' estates' assets and nullify the benefit of the avoidance of the transfers.

WHEREFORE, the Debtors demand judgment against the Sureties and Bonded Claimants (i) determining that this Court should enter an injunction channeling the Bonded Claimants' claims against the Sureties to the property recovered from the Sureties pursuant to §550 of the Code; and (ii) granting to the Debtors such other and further relief as is just.

Dated: May 10, 1993.

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By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Second Amended Complaint to Avoid and Recover Preferential and Constructively Fraudulent Transfers Made for the Benefit of Bonded Claimants, to Disallow, or in the Alternative, Subordinate Punitive Damage Awards, to Disallow Post-Petition Interest and Unmatured Interest, to Disallow Post-Petition Bond Premiums and to Enjoin Certain Actions Against Sureties has been furnished by U. S. Mail to all persons on the attached Master Service List and all persons on the attached Core Service List this ____ day of May, 1993.

Paul D. Watson

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**THE UNITED STATES BANKRUPTCY COURT
 MIDDLE DISTRICT OF FLORIDA
 TAMPA DIVISION**

IN RE: Chapter 11

THE CELOTEX
 CORPORATION and
 CAREY CANADA, INC., Consolidated Case Nos.:
 90-10016-8B1 and
 90-10017-8B1

Debtors.

 THE CELOTEX CORPORATION and
 CAREY CANADA INC.,

Plaintiffs,

v. Adversary No.: 92-584

 ALLSTATE INSURANCE COMPANY and
 each of the Defendants
 on Schedule A,

Defendants.

**ANSWER OF THE BARON & BUDD DEFENDANTS
 TO DEBTORS' COMPLAINT**

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW defendants Viold Moeckel, Evangeline
 Moeckel, Ronnie Trent, Susan Trent, Frank C. Foytik, Kenneth

O. Allen, Howard Legg, Howard Pitts, Robert L. Coker, Warren Harvey Coker, Troy Hilliard Manning, Charles R. Moore, Louis Colon, Jeannette Colon, Clyde A. Thompson, Aline Thompson, Clifford Chamlee, Billy McCleary, Nancy McCleary, Bennie Edwards, JoAnn Edwards, George Brown, A. L. Cook, JoAnn Cook, Walker Peterson, Eloise Peterson, Oscar Thomley, Verlene Thomley, Daniel Willis, Carolyn Willis, Elwood Hamlet, Lois Hamlet, Vincent Lewis, Ruby Lewis, Herman Mensing, Jr., Frances Mensing, and Manuel Lucero, all represented by the law firm of Baron & Budd and hereinafter referred to as "the Baron & Budd defendants," and answer the complaint filed by debtors Celotex Corporation and Carey Canada, Inc., hereinafter referred to as "debtors," as follows:

1. The Baron & Budd defendants admit the allegations in paragraphs 1-3 of the complaint.

2. The Baron & Budd defendants admit the general propositions of law contained in paragraph 4 of the complaint, except that they deny that any provision of the bankruptcy code grants the authority to disallow liquidated and secured punitive damages claims, to subordinate any claims of the "Bonded Claimants," and to permanently enjoin the prosecution of claims against entities other than the debtor.

3. The Baron & Budd defendants deny the allegations in paragraph 5 of the complaint.

4. The Baron & Budd defendants admit the allegations in paragraph 6 of the complaint.

5. The Baron & Budd defendants deny the allegation in paragraph 7 of the complaint that this court may exercise subject matter jurisdiction over debtors' claims against the Baron & Budd defendants. The relationship between the Baron & Budd defendants and the sureties named as defendants in debtors' complaint is not "related to" this bankruptcy case, and therefore

this court cannot derive jurisdiction to adjudicate this action from 28 U.S.C. § 1334(b). The Baron & Budd defendants admit that, if the bankruptcy court had jurisdiction over the action under 28 U.S.C. § 1334(b), which it does not, this is a core proceeding under 28 U.S.C. § 157(b)(2).

6. The Baron & Budd defendants admit that if the court had jurisdiction over this action against the Baron & Budd defendants under 28 U.S.C. § 1334(b), which it does not, venue in this court would be proper as alleged in paragraph 8 of the complaint.

7. The Baron & Budd defendants admit the allegations in paragraphs 9-10 of the complaint.

8. The Baron & Budd defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 11-55, 57-60, 62-68, 70-73, 101-111, 113, 116-131, 133-134, 136-137, 140, and 142-147, and therefore deny same to place them in issue.

9. The Baron & Budd defendants admit the allegations in paragraph 56 of the complaint relating to Viroid and Evangeline Moeckel, except that they are without knowledge or information sufficient to form a belief concerning the allegation that the bond was posted pursuant to an agreement between the debtors and Northbrook, and therefore deny said allegation to place it in issue.

10. The Baron & Budd defendants admit the allegations in paragraph 61 of the complaint relating to Ronnie and Susan Trent, and further allege that the appellate process in that case has been concluded and the judgment finally affirmed.

11. The Baron & Budd defendants admit the allegations in paragraph 69 of the complaint relating to Frank C. Foytik, except that they are without knowledge or information sufficient

to form a belief concerning the allegation that the bond was posted pursuant to an agreement between the debtors and Northbrook, and therefore deny said allegation to place it in issue.

12. The Baron & Budd defendants admit the allegations in paragraph 74 of the complaint relating to Kenneth O. Allen, except that they are without knowledge or information sufficient to form a belief concerning the allegation that the bond was posted pursuant to an agreement between the debtors and Home Insurance Company, and therefore deny said allegation to place it in issue.

13. The Baron & Budd defendants admit the allegations in paragraph 95 of the complaint relating to Howard Legg.

14. The Baron & Budd defendants admit the allegations in paragraph 96 of the complaint relating to Howard Pitts.

15. The Baron & Budd defendants admit the allegations in paragraph 97 of the complaint relating to Robert L. Coker, except that they deny the allegation that Celotex's and Carey Canada's shares of the \$167,000.00 judgment are \$55,666.67 each. Celotex and Carey Canada are jointly and severally liable for the full amount of the judgment, as established by the fact that Celotex and Carey Canada posted a supersedeas bond securing the full amount of the judgment.

16. The Baron & Budd defendants admit the allegations in paragraph 98 of the complaint relating to Warren Harvey Coker, except that they deny the allegation that Celotex's and Carey Canada's shares of the \$131,000.00 judgment are \$43,666.67 each. Celotex and Carey Canada are jointly and severally liable for the full amount of the judgment, as established by the fact that Celotex and Carey Canada posted a supersedeas bond securing the full amount of the judgment.

17. The Baron & Budd defendants admit the allegations in paragraph 99 of the complaint relating to Troy Hilliard Manning, except that they deny the allegation that Celotex's and Carey Canada's shares of the \$370,000.00 judgment are \$123,333.33 each. Celotex and Carey Canada are jointly and severally liable for the full amount of the judgment, as established by the fact that Celotex and Carey Canada posted a supersedeas bond securing the full amount of the judgment.

18. The Baron & Budd defendants admit the allegations in paragraph 100 of the complaint relating to Charles R. Moore, except that they deny the allegation that Celotex's and Carey Canada's shares of the \$486,000.00 judgment are \$162,000.00 each. Celotex and Carey Canada are jointly and severally liable for the full amount of the judgment, as established by the fact that Celotex and Carey Canada posted a supersedeas bond securing the full amount of the judgment.

19. The Baron & Budd defendants admit the allegations in paragraph 112 of the complaint relating to Louis and Jeanette Colon, except that they are without knowledge or information sufficient to form a belief concerning the allegation that the bond was posted pursuant to an agreement between the debtors and Home Insurance Company, and therefore deny said allegation to place it in issue. The Colons further allege that the appellate process in that case has been concluded and the judgment finally affirmed.

20. The Baron & Budd defendants admit the allegations in paragraph 114 of the complaint relating to Clyde and Aline Thompson, except that they are without knowledge or information sufficient to form a belief concerning the allegation that the bond was posted pursuant to an agreement between the debtors and Home Insurance Company, and therefore deny said allegation to place it in issue. The Thompsons further allege that the appellate process in that case has been concluded and the judgment finally affirmed.

21. The Baron & Budd defendants admit the allegations in paragraph 115 of the complaint relating to Clifford Chamlee, except that they are without knowledge or information sufficient to form a belief concerning the allegation that the bond was posted pursuant to an agreement between the debtors and Home Insurance Company, and therefore deny said allegation to place it in issue.

22. The Baron & Budd defendants admit the allegations in paragraph 132 of the complaint relating to Billy and Nancy McCleary, except that they are without knowledge or information sufficient to form a belief concerning the allegation that the bond was posted pursuant to an agreement between the debtors and Northbrook, and therefore deny said allegation to place it in issue.

23. The Baron & Budd defendants admit the allegations in paragraph 135 of the complaint relating to Bennie Edwards, except that they are without knowledge or information sufficient to form a belief concerning the allegation that the bond was posted pursuant to an agreement between the debtors and Northbrook, and therefore deny said allegation to place it in issue. Mr. Edwards further alleges that the appellate process in that case has been concluded and the judgment finally affirmed.

24. The Baron & Budd defendants admit the allegations in paragraph 138 of the complaint relating to George Brown, A.L. Cook, JoAnn Cook, Walker Peterson, Eloise Peterson, Oscar Thomley, and Verlene Thomley, except to note that the judgment was properly appealed to the United States Court of Appeals for the Eleventh Circuit.

25. The Baron & Budd defendants admit the allegations in paragraph 139 of the complaint relating to Daniel and Carolyn Willis, Elwood and Lois Hamlet, Vincent and Ruby Lewis, and Herman and Frances Mensing, and further allege that the appellate process in that case has been concluded and the judgment finally affirmed.

26. The Baron & Budd defendants admit the allegations in paragraph 141 of the complaint relating to Manuel Lucero, and further allege that the appellate process in that case has been concluded and the judgment finally affirmed.

27. The Baron & Budd defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 144-147, 149-158, and 160-184 of the complaint, and therefore deny same to place them in issue.

28. The Baron & Budd defendants deny the allegations in paragraphs 148 and 159 of the complaint.

29. The Baron & Budd defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 185-201 of the complaint, and therefore deny same to place them in issue.

30. The Baron & Budd defendants deny the allegations in paragraphs 187-193 of the complaint.

31. The Baron & Budd defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 194-195 of the complaint, and therefore deny same to place them in issue.

32. The Baron & Budd defendants deny the allegations in paragraphs 196-199 of the complaint.

33. The Baron & Budd defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 200-201 of the complaint, and therefore deny same to place them in issue.

34. The Baron & Budd defendants deny the allegations in paragraphs 202-207 of the complaint.

35. The Baron & Budd defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 208-210 of the complaint, and therefore deny same to place them in issue.

36. The Baron & Budd defendants deny the allegations in paragraphs 211-216 of the complaint.

37. The Baron & Budd defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 217-222 of the complaint, and therefore deny same to place them in issue.

38. The Baron & Budd defendants deny the allegations in paragraphs 223-224 of the complaint.

39. The Baron & Budd defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 225 of the complaint, and therefore same to place them in issue.

40. The Baron & Budd defendants deny the allegations contained in paragraph 226 of the complaint.

41. The Baron & Budd defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 227-230 of the complaint, and therefore deny same to place them in issue.

42. The Baron & Budd defendants deny the allegations in paragraphs 231-234 of the complaint.

43. The Baron & Budd defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 235-237 of the complaint, and therefore deny same to place them in issue.

44. The Baron & Budd defendants deny the allegations in paragraph 238 of the complaint.

45. The Baron & Budd defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 239-241 of the complaint, and therefore deny same to place them in issue.

46. The Baron & Budd defendants deny the allegations in paragraphs 242-245 of the complaint.

47. The Baron & Budd defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 246-254 of the complaint, and therefore deny same to place them in issue.

48. The Baron & Budd defendants deny the allegations in paragraphs 255-257 of the complaint.

AFFIRMATIVE DEFENSES

49. This court does not have subject matter jurisdiction over this action against the Baron & Budd defendants.

50. The complaint fails to state a claim upon which relief can be granted.

51. Debtors' complaint against the Baron & Budd defendants is unsupported in law or equity.

52. Debtors' complaint against the Baron & Budd defendants is precluded by 11 U.S.C. § 524(e), which provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."

53. Debtors' complaint seeking disallowance for subordination of punitive damages is barred by the doctrine of collateral estoppel, because the awards of punitive damages have, in all instances, been ordered or upheld by other courts of competent jurisdiction. The court has no legislative or constitutional authority to overrule those courts in which the judgments were entered and affirmed.

54. A judgment impairing the ability of the Baron & Budd defendants to enforce obligations owed to them by sureties not in bankruptcy would constitute a taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution.

WHEREFORE, PREMISES CONSIDERED, the Baron & Budd defendants demand judgment dismissing debtors' complaint, and awarding to the Baron & Budd defendants such other and further relief to which they are justly entitled.

Respectfully submitted,

BARON & BUDD, P.C.
The Centrum
3102 Oak Lawn Avenue
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Dallas, Texas 75219-4182
(214) 521-3605

BRENT M. ROSENTHAL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answers to Complaint was mailed to Jeffrey W. Warren, Bush, Ross, Gardner, Warren & Rudy, 220 South Franklin Street, Tampa, Florida 33602, counsel for debtors Celotex Corporation and Carey Canada, Inc. and to the Celotex Core Counsel List attached hereto, on this 12th day of October, 1992.

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UNITED STATES BANKRUPTCY COURT
 MIDDLE DISTRICT OF FLORIDA
 TAMPA DIVISION

IN RE:) Chapter 11
)
THE CELOTEX)
CORPORATION, et al.) Consolidated Case Nos.:
) 90-10016-8B1 and
) 90-10017-8B1
<hr/> THE CELOTEX)
CORPORATION and)
CAREY CANADA,)
)
Plaintiffs,)
)
v.)
)
ALLSTATE INSURANCE)
COMPANY, et al.,)
)
Defendant.)
<hr/>)

**DEFENDANTS MANUEL LUCERO,
 BENNIE AND JOANNE EDWARDS
 AND BILLY AND NANCY MCCLEARY'S
 MOTION FOR SUMMARY JUDGMENT ON
 COUNTS I, II, III, IV, V, VI, IX, X AND XI
 OF DEBTORS' SECOND AMENDED COMPLAINT**

Pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure and Rule 56 of the Federal Rules of Civil Procedure incorporated therein, defendant judgment creditors Manuel Lucero, Bennie and Joanne Edwards, and Billie and Nancy

McCleary move for summary judgment on all Counts of Debtors' Second Amended Complaint. The supersedeas bonds posted in favor of the defendant judgment creditors named in this motion were filed more than one year prior to the filing of the bankruptcy petition. In each case, some portion of the judgments secured by the bonds includes an award of punitive damages.

In support of this motion, defendants file the memorandum of law of defendants Manuel Lucero, Bennie and Joanne Edwards, and Billie and Nancy McCleary in support of motion for summary judgment on Counts I, II, III, IV, V, VI, IX, X and XI of Debtors' Second Amended Complaint. For the reasons stated therein, defendants request that the Court enter summary judgment in defendants' favor and grant such other relief as this Court deems just and proper.

Respectfully submitted,

SONNENSCHN NATH & ROSENTHAL

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June 14, 1994

VIA FEDERAL EXPRESS

Jeffrey W. Warren, Esq.
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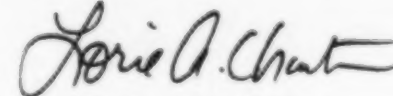
Re: Celotex v. Edwards

Dear Jeff:

Pursuant to Supreme Court Rule 37, I am writing to request your consent to the filing of a brief by Northbrook Property and Casualty Insurance Company as amicus curiae in support of Petitioner's position in the Supreme Court in the above-captioned matter. Please indicate your consent by signing on the line provided below. After you have done so, please return this document to me.

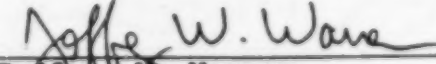
Very truly yours,

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By: 
Lorie A. Chaiten

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CONSENT TO FILING OF AMICUS BRIEF


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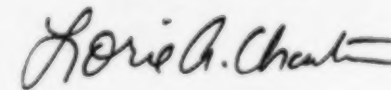
Re: Celotex v. Edwards

Dear Mr. Rosenthal:

Pursuant to Supreme Court Rule 37, I am writing to request your consent to the filing of a brief by Northbrook Property and Casualty Insurance Company as amicus curiae in support of Petitioner's position in the Supreme Court in the above-captioned matter. Please indicate your consent by signing on the line provided below. After you have done so, please return this document to me.

Very truly yours,

SONNENSCHN NATH & ROSENTHAL

By: 
Lorie A. Chaiten

LAC/kh

CONSENT TO FILING OF AMICUS BRIEF


Brent M. Rosenthal

8

No. 93-1504

Supreme Court, U.S.
FILED

AUG 24 1994

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

THE CELOTEX CORPORATION,
Petitioner,

v.

BENNIE EDWARDS AND JOANN EDWARDS,
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals for the Fifth Circuit

**BRIEF OF AMICUS CURIAE
ASSOCIATION OF TRIAL LAWYERS OF AMERICA
IN SUPPORT OF RESPONDENTS**

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IN THE
Supreme Court of the United States

October Term, 1993

No. 93-1504

THE CELOTEX CORPORATION,
Petitioner,

v.

BENNIE EDWARDS AND JOANN EDWARDS,
Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals for the Fifth Circuit**

**BRIEF OF AMICUS CURIAE
ASSOCIATION OF TRIAL LAWYERS OF AMERICA
IN SUPPORT OF RESPONDENTS**

IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose approximately 60,000 members primarily represent injured plaintiffs in civil actions. Written consents of both parties to the filing of this brief have been filed with the Clerk of the Court.

Indeed, most of the people who have bonded judgments against Celotex are represented by members of ATLA. Trials of cases on behalf of these clients result in judgments that are appealed by the adverse party. The judgments obtained on

behalf of those clients are secured on appeal by the posting of surety bonds. Both the clients of ATLA members and the parties adverse to those clients rely on the usefulness and integrity of surety bonds to protect the judgment on appeal while a stay of execution of the judgment is in effect. ATLA's members have a great interest in knowing whether surety bonds posted to secure judgments on appeal are adequate to serve their intended purpose or whether ATLA's members, in representing their clients, should object to the use of surety bonds because they will not be honored in the event of the bankruptcy of the judgment debtor.

ATLA is interested in the impact of the bankruptcy court's 11 U.S.C.A. §105(a) injunction has had outside of the immediate bankruptcy context. ATLA presents a broader perspective of the overall impact on the Section 105(a) injunction on post-judgment procedures than the other parties to this case.

STATEMENT OF THE CASE

The Edwards obtained one of over 100 money judgments against Celotex on account of asbestos-caused disease or death. The vast majority of those judgments were for compensatory damages only. Appendix to Amicus Brief of Northbrook at A-22 to A-111, *Edwards v. Celotex Corp.*, 6 F.3d 312, 318 (5th Cir. 1993). The Edwards' judgment included both compensatory and punitive damages. Celotex appealed virtually every judgment entered against it in an asbestos disease case. To obtain a stay of execution pending appeal, Celotex posted a surety bond in each case. The surety bond, on its face, was a promise to pay the judgment creditor the amount of the bond conditioned only on the judgment being affirmed and Celotex not paying the judgment. Joint Appendix at 12-17. In October 1994, it will have been four years since Celotex filed its bankruptcy petition. To date, none of the judgments has been paid. Nor has the surety paid the amount of any of the bonds issued.

The surety bonds were filed by insurance companies that has written liability insurance policies for Celotex. The bonds were secured by those insurance policies. Brief for Petitioner at 16. The manner in which the bonds were financed was not disclosed to the judgment creditors nor to the courts where the bonds were posted. Fed. R. Civ. P. 62(d) provides that by posting a supersedeas bond a judgment debtor may obtain a stay of execution, "... when the supersedeas bond is approved by the court." The convoluted financing mechanism utilized by Celotex and its insurers, such as Northbrook, to obtain and post surety bonds was information withheld from the courts whose job it was to pass on the adequacy of the bonds to secure judgment on appeal.

Because the judgment creditors were not given information concerning the financing of the bonds, and the bonds themselves gave no indication they were subject to any limitation or condition other than stated on the face of the bond, the judgment creditors, such as the Edwards, were deprived of the opportunity to object to the bonds on the basis of the manner in which they were financed.

SUMMARY OF ARGUMENT

In 1789 Congress enacted a statute providing for the posting of good and sufficient security by which a judgment debtor could obtain a stay of execution pending appeal. This resulted in a smooth, efficient, uniform and reliable procedure in state and federal courts for handling this aspect of post-judgment procedure.

The 11 U.S.C.A. §105(a) injunction issued by the Celotex bankruptcy court virtually destroys the utility of surety bonds as security on appeal. The injunction disrupts long established procedures utilized by parties and courts for orderly administration of appeals by calling into question the

usefulness of surety bonds to perform their intended function of providing a stay of execution pending appeal, while protecting the judgment creditor's ability to ultimately collect.

The injunction places an unfair burden on judgment creditors of modest means by forcing them to travel to the bankruptcy court to seek relief from the stay, rather than applying to the court where the bond is filed. Fed. R. Civ. P. 65.1. With the spectre of surety bonds being useless to secure a judgment on appeal, injured people will be subject to an unfair negotiating tactic, being persuaded to accept settlement of claims for less than reasonable amounts.

ARGUMENT

THE BANKRUPTCY COURT ORDER DESTROYS THE PURPOSE AND UTILITY OF SURETY BONDS TO OBTAIN A STAY OF EXECUTION DURING APPEAL.

The Celotex bankruptcy court 11 U.S.C.A. §105(a) injunction destroys the purpose of surety bonds as security on appeal. That purpose is to permit the judgment debtor to obtain a stay of execution of the judgment pending appeal and insure that the judgment creditor's ability to collect the judgment is not impaired because of the stay of execution. The surety bond guarantees payment of a judgment if the judgment is affirmed on appeal and thereafter the judgment debtor fails to pay the judgment. The principal eventuality making a judgment uncollectable after appeal is the insolvency of the judgment debtor. It is that eventuality against which a surety bond provides protection.

The operation of the Celotex §105(a) injunction is bizarre. It turns the purpose of surety bonds upside down.

The very purpose of the bonds was to protect judgment creditors such as the Edwards in the event Celotex became insolvent, filed bankruptcy or otherwise became unable to pay the judgment. Then, when the precise eventuality against which the bond was to protect occurs -- insolvency and bankruptcy -- the judgment creditor is enjoined from collecting on the bond.

This Alice in a legal wonderland result is one which this Court should not accept. *Edwards v. Celotex Corp.*, 6 F.3d 312, 319 (5th Cir. 1993); *Grubb v. Federal Deposit Ins. Corp.*, 833 F.2d 222, 226 (10th Cir. 1987). A supersedeas bond is supposed to "guarantee" payment of the judgment should the judgment be affirmed. *Muck v. Arapahoe County District Court*, 814 P.2d 869 (Colo. 1991); *Seventh Elect Church v. Rogers*, 660 P.2d 280, 34 Wash. App. 105 (1983). The Celotex §105(a) injunction destroys that guarantee.

A. Orderly and Established Post-Judgment Procedures are Disrupted.

The procedures and the purpose for obtaining a stay of execution of a judgment pending appeal have been long established. They were created in England, imported to the American colonies, codified in the United States in 1789, and made the subject of a Supreme Court rule in 1867. *Kountz v. Omaha Hotel Company*, 107 U.S. 378, 380-87 (1882). The Celotex §105(a) injunction attacking the integrity of such bonds comes, therefore, against a background of over 200 years of the bar and litigants having utilized surety bonds on appeal with confidence in their ability to accomplish their intended function.

When a judgment is obtained, execution in aid of collecting the judgment can issue. Fed. R. Civ. P. 69. By posting a supersedeas bond the judgment debtor obtains a stay of execution and avoids disruption of its activities that would occur due to collection efforts (such as attachment,

garnishment, and execution on assets). If the judgment is reversed on appeal, the judgment debtor is not faced with the need to reclaim from the judgment creditor assets obtained through Rule 69 procedures.

The judgment creditor is protected because the judgment is secured by the bond. This prevents the judgment creditor from being prejudiced due to the stay of execution pending appeal. Requiring court approval of the surety bond under Fed. R. Civ. P. 62(d) insures that the surety is substantial and will be available to make good on the bond. If it appears that the sureties are inadequate or the bond was approved based on inadequate disclosure of pertinent facts concerning the sureties, it may be rejected and a new bond refused. *Florida Central R. Co. v. Schulte*, 100 U.S. 644, 646 (1879)

Before the Celotex §105(a) injunction, creditors whose judgments were secured on appeals by a surety bond were secure in the belief that the surety bond would perform its stated purpose. In the 205 years since Congress passed a statute authorizing the use of "good and sufficient" security for supersedeas purposes, no case had ever held that surety bonds were subject to bankruptcy court injunction. The Celotex §105(a) injunction disrupts and jeopardizes this process. It destroys the expectations of the parties to the judgment and of the courts which approved the surety bond and ordered the stay of execution. It destroys the confidence in the utility of surety bonds to perform their intended function. It destroys the ability of courts and parties to rely on surety bonds to secure payment of a judgment. This is especially true in this case, where the unusual financing mechanism for the surety bonds was not disclosed to the court or to the judgment creditors.¹ Now Celotex seeks to go

¹In this context it is noteworthy that in the months before filing bankruptcy, Celotex paid hundreds of thousands of dollars to settle cases pending against it. No effort has ever been made by Celotex to set aside or void any of the transfers made to settle cases. This underscores the

back four years, to 1990, to void the surety bonds it issued. Brief for Petitioner at 44.

The bankruptcy court order casts doubt upon the usefulness of surety bonds to secure judgments on appeal, especially in those cases where such surety is most needed -- where the judgment debtor has financial problems. The impact of the Celotex §105(a) injunction in destroying confidence in surety bonds to secure judgments on appeal is already being felt.

Delaware and Colorado state courts have recently, in asbestos disease cases, rejected surety bonds as security on appeal and required a deposit in court of cash in the amount of the judgment. *Owens Corning Fiberglas Corp. v. Carter*, 630 A.2d 647 (Del. 1993); *Cardenas v. Owens Corning Fiberglas Corp.*, No. 94CA606 (Colo. App. 1994) (affirming state district court order requiring Owens Corning to deposit over one million dollars with the court). The uncertainty engendered by the Celotex §105(a) injunction is the reason compelling these courts to reject surety bonds and to require a cash payment as security on appeal. The Celotex bankruptcy court's §105(a) injunction has managed, by itself, to infect a long-established and efficient procedure for post-judgment stays of execution and securing of judgments on appeal.

The fact that a surety bond is rejected and a cash transfer is ordered reflects a debtor with questionable economic health. Requiring a cash transfer as security on appeal further burdens an already burdened debtor. Such a cash transfer may

fact that the financing mechanism for the bonds provides the principal basis for arguing that the bonds should be set aside as preferential transfers. It also casts doubt on the Celotex argument that it is interested in treating "all creditors" equally. Last minute settlement payments surely depleted Celotex's assets to the detriment of other claimants. Celotex, however, has made no effort to retrieve those last minute settlement payments.

force a bankruptcy when it would have been avoided if a surety bond had been available to secure the judgment pending appeal. Nonetheless, a court cannot be criticized for rejecting a surety bond when there is reasonable doubt that it will serve the purpose that it was once assumed, as a matter of course, that it would serve. This Court can restore the usefulness of surety bonds to secure judgments on appeal by answering the certified question in the affirmative.

Judgment creditors objecting to the use of surety bonds are opposed by judgment debtors who understandably do not want to transfer cash to secure the judgment pending appeal. Therefore, the doubt cast by the bankruptcy court's order causes additional litigation over the supersedeas security issue. In the *Carter* and *Cardenas* cases, *supra*, that litigation reached the appellate level.

There are several litigated issues when a judgment creditor objects to use of a surety bond. What is the judgment debtor's financial condition? It is such that a judgment creditor and the trial court will be reasonably concerned about the vitality of the judgment debtor at the end of appeal? In viewing the debtor future financial prospects, is bankruptcy a valid concern? In a bankruptcy or other similar proceeding, will a surety bond prove adequate to insure the judgment is paid. *See, e.g., Carter, supra*, for a list of factors to be weighed in deciding whether to reject a surety bond.

B. Fairness and Convenience to Judgment Creditors Is Impaired.

Fed. R. Civ. P. 65.1 gives jurisdiction to the court where the bond is filed, generally the forum where the case was tried. The §105(a) injunction ignores Rule 65.1 and requires judgment creditors to travel to Florida to ask for relief. In this case, relief was denied. Brief of Petitioner at 16. In other cases, the bankruptcy court refuses to make any ruling on a request for relief from the stay, leaving the bond holder in

perpetual limbo and ongoing hardship. Mealy's Litigation Reports, Asbestos, Vol. 9, No. 12, at 7 and E1 - E4 (July 15, 1994). This is avoided by application of Rule 65.1, permitting enforcement of the bond in the court where the plaintiff obtained the judgment.

C. An Unfair Negotiating Tool is Given to Judgment Debtors.

An additional effect of the Celotex §105(a) injunction is to hand to defendants a lever to unfairly force settlement of meritorious claims for amounts below what would otherwise be viewed as reasonable. The argument made by such defendants is, "Even if you get a judgment, we will forestall collection by posting a surety bond and appealing. By the time the appeal is concluded we will have filed bankruptcy and you will lose the protection of the surety bond -- you will collect nothing."

Appealing a case, whether or not the appeal has genuine merit, is a regularly employed tactic to forestall payment of a judgment. The threat of appeal is regularly used as a negotiating tool. In the past, the threat of an appeal as a bargaining chip has been somewhat mitigated because of the security of a bonded judgment. When the threat of appeal is accompanied by a threat of bankruptcy which will render a surety bond useless for its intended purpose, a judgment creditor may be unfairly pressured into giving up rights that ought to be protected through a surety bond.

One of the reasons for harmed individuals of modest economic standing, such as the Edwards, to assume the substantial expense and other risks of trial is in knowing that if they obtain a judgment it will be satisfied, either by execution against the judgment debtor, or through the surety bond posted as security on appeal. If the security of a bonded judgment is lost, such individuals may be deterred from seeking compensation at all, or may be unfairly persuaded to

accept far less compensation than their losses would otherwise warrant. In other words, the risk of a surety bond being effectively nullified by a bankruptcy court should not be added to the risks of delay and an adverse outcome on appeal.

Most of the bonds in the Celotex bankruptcy secure judgments for compensatory damages. The bond holders, who in this case suffer serious diseases or are the survivors of those who died from asbestos-caused illness, remain uncompensated. They ran the gauntlet of trial and appeal, and they were unable to execute their judgments due to the surety bonds that were posted. They should not now be put in a worse position for accepting a surety bond than they would have been had there been no surety bond and they had been able to execute on their judgments.

CONCLUSION

For these reasons, Amicus urges this Court to answer the certified question in the affirmative.

Respectfully submitted,

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Association of Trial Lawyers
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August 24, 1994

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No. 93-1504

Supreme Court, U.S.

FILED

AUG 26 1994

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

THE CELOTEX CORPORATION,

Petitioner,

vs.

BENNIE EDWARDS and JOANN EDWARDS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF THE NEW YORK CLEARING
HOUSE ASSOCIATION, AMICUS CURIAE
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August 24, 1994

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No. 93-1504

IN THE
Supreme Court of the United States

October Term, 1994

THE CELOTEX CORPORATION,
Petitioner,

v.

BENNIE EDWARDS and JOANN EDWARDS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
 COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF THE NEW YORK CLEARING
 HOUSE ASSOCIATION, AMICUS CURIAE
 SUPPORTING AFFIRMANCE**

This brief is in support of affirmance and is filed pursuant to Rule 37.3 with the consent of all parties.

Interest of Amicus Curiae

The New York Clearing House Association (the "Clearing House") is an association of 11 leading commercial banks in the City of New York.¹ The Clearing

¹ The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company (continued...)

House regularly appears as *amicus curiae* in cases raising significant questions of law relating to banking, including cases concerning the enforceability of letters of credit.²

The Clearing House addresses only the issue whether the supersedeas bond posted by Petitioner is property of the estate of Petitioner, a debtor in possession under the Bankruptcy Code. The Fifth Circuit held that a supersedeas bond is not property of a debtor in bankruptcy, and thus is not subject to the automatic stay of 11 U.S.C. § 362(a) or the equitable powers of the bankruptcy court under 11 U.S.C. § 105. *Edwards v. Armstrong World Indus., Inc.*, 6 F.3d 312, 317 (5th Cir. 1993). The Fifth Circuit recognized that efforts by bankruptcy courts to enjoin payments under letters of credit raise similar issues, and hence relied heavily on *Kellogg v. Blue Quail Energy, Inc. (In re Compton Corp.)*, 831 F.2d 586, 589 (5th Cir. 1987), *modified on other grounds*, 835 F.2d 584 (1988), which held that because a letter of credit is not property of the debtor's estate, the bankruptcy court could not enjoin a payment of funds from the letter of credit to the beneficiary. The other briefs filed with the Court have not addressed this dispositive issue.

Letters of credit are essential to facilitating the national and international flow of commerce. U.S. banks have more than \$200 billion of letters of credit outstanding. Ferguson & Co., *BankSource* (1994). The member banks of the Clearing House have outstanding letters of credit with an aggregate

¹(...continued)

of New York, National Westminster Bank USA, European American Bank and Republic National Bank of New York.

² A letter of credit is an arrangement involving an issuer (a bank), its customer, and a third party beneficiary. For a fee paid by the customer, the bank agrees to take on primary liability to pay the beneficiary upon the occurrence or non-occurrence of a specified event (for example, the customer's default on payment or performance).

value in the tens of billions of dollars. Reversal of the decision of the Fifth Circuit could call into question existing letter of credit law and practices, and would impede the flow of commerce by undermining the reasonable expectations of the member banks, their customers and beneficiaries of letters of credit. In particular, reversal might call into question the established principles that the obligation of the issuing bank under a letter of credit is entirely separate and distinct from the transactions that resulted in the bank issuing the letter of credit, that a letter of credit is an obligation only of the issuing bank and not property of the estate, and that the integrity and independence of letters of credit must be protected, not nullified, by the courts if letters of credit are to serve their essential function.

ARGUMENT

I.

The Supersedeas Bond Is Not Property Of Petitioner's Estate Subject To The Automatic Stay Or The Section 105 Injunction Because Petitioner Retains No Interest In It.

Courts have long recognized that a supersedeas bond is not an asset of the debtor's estate under the bankruptcy laws, particularly if the debtor retains no interest or even an attenuated interest in it. *See, e.g., Mid-Jersey Nat. Bank v. Fidelity-Mortgage Investors*, 518 F.2d 640, 643 (3d Cir. 1975) (funds deposited with court as supersedeas bond are considered *res* of a trust and court is charged with determining beneficiaries); *Saper v. West*, 263 F.2d 422, 427 (2d Cir. 1959), *cert. denied*, 360 U.S. 916 (1959); *Carter Baron Drilling v. Excell Energy Corp.*, 76 B.R. 172, 174 (D. Colo. 1987) (debtor has at most a contingent reversionary interest in its supersedeas bond and therefore

bond is not property of estate); *Moran v. Johns-Manville Sales Corp.*, 28 B.R. 376, 377 (D.C. Ohio 1983).

This reasoning applies with particular force where, as here, the beneficiary of the bond has already had its victory at trial affirmed on appeal, thereby divesting the debtor of even a contingent interest in its bond.³ As the court in *Carter Baron* observed, "any contingent reversionary interest [the debtor] had in the funds terminated . . . when the . . . Court of Appeals affirmed" 76 B.R. at 174.

The court below recognized the dispositive effect of the end of the appeal process. *Edwards*, 6 F.3d at 317. It then went on to base its decision in large part on the similarities it identified between supersedeas bonds and letters of credit. *Id.* ("The promise of [a] bank to pay on a letter of credit is indistinguishable from Northbrook's promise to act as surety on the supersedeas bond."). A number of other courts have likewise found a strong resemblance between the two instruments. *See, e.g., Ligurotis v. Whyte*, 951 F.2d 818, 821 (7th Cir. 1992) (" . . . a letter of credit may serve as the equivalent of a supersedeas bond"); *Trans World Airlines, Inc. v. Hughes*, 515 F.2d 173, 177 (2d Cir. 1975) (treating supersedeas bond and letter of credit as interchangeable), *cert. denied*, 424 U.S. 934 (1976); *Southmark Corp. v. Riddle (In re Southmark Corp.)*, 138 B.R. 820, 828 (Bankr. N.D. Tex. 1992) (secured supersedeas bond closely resembles secured letter of credit).

According to these courts, letters of credit and supersedeas bonds are most alike in their insulation of the obligations of the issuer and surety from the actions of the debtor. *In re Southmark*, 138 B.R. at 828. It is essential to

³ Although a few courts have stated that the debtor retains an interest in its supersedeas bond during the pendency of the appeal, *see, e.g., Sheldon v. Munford, Inc.*, 902 F.2d 7, 8 (7th Cir. 1990), this issue is wholly irrelevant here because the appeal has been decided.

both instruments that the issuing entity is obligated to pay the beneficiary upon proper demand, without regard to the ability of the debtor itself to pay. *Id.* In both cases, therefore, the issuer's "independent obligation to the beneficiary protects the beneficiary as a creditor of the grantor." *Id.*

In other words, the letter of credit is valuable precisely because *the debtor is not obligated to make the payment*. The supersedeas bond, intended as a protection against the insolvency or other inability to pay of a judgment debtor, is valuable for exactly the same reason: it guarantees payment regardless of what happens to the debtor. *Blue Quail*, 831 F.2d at 590. *See also Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n*, 636 F.2d 755, 760 (D.C.Cir. 1980) (bond secures appellee from loss during pending appeal); *Mid-Jersey*, 518 F.2d at 644 (purpose of deposit placed with court in lieu of supersedeas bond is to protect party prevailing at trial from possible insolvency of loser).

For these reasons, doctrines that have evolved to protect the integrity and independence of the letter of credit should also protect the supersedeas bond with equal force. Because the Bankruptcy Code does not give bankruptcy courts authority over assets that are not property of the debtor's estate, letters of credit are almost universally found immune from bankruptcy stays and injunctions. *See, e.g., First Fidelity Bank v. Prime Motor Inns, Inc. (In re Prime Motor Inns, Inc.)*, 130 B.R. 610, 613 (S.D. Fla. 1991) (letter of credit is separate contract between issuer and beneficiary); *Security Servs., Inc. v. National Union Fire Ins. Co. (In re Security Servs., Inc.)*, 132 B.R. 411, 414 (Bankr. W.D. Mo. 1991) (bank issuing letter of credit has obligation independent of customer's) (dictum); *Braucher v. Continental Ill. Nat. Bank & Trust Co. (In re Illinois-California Express, Inc.)*, 50 B.R. 232, 234 (Bankr. D.

Colo. 1985) (letter of credit not part of debtor's estate); *Printing Dep't, Inc. v. Xerox Corp. (In re Printing Dep't, Inc.)*, 20 B.R. 677, 680 (Bankr. E.D. Va. 1981) (issuer of letter of credit assumes primary obligation); *Page v. First Nat. Bank (In re Page)*, 18 B.R. 713, 715 (D.D.C. 1982) (same).⁴ The Clearing House respectfully requests that the Court afford the same protection to supersedeas bonds.

II.

Reversal Of The Decision Below Would Call Into Question The Stability Of Vast Numbers Of Existing Commercial And Financial Transactions.

A. Letters of Credit are Essential to a Wide Variety of Transactions.

Traditionally, letters of credit were used as a payment mechanism in connection with the sale of goods between geographically distant parties. Because the issuing bank's credit effectively replaced that of the distant purchaser, the seller was assured of payment and was thus more willing to do business with the buyer. As explained by the New York Court of Appeals,

"Letters of credit provide a quick, economic and predictable means of financing transactions for parties not willing to deal on open accounts by permitting the seller to rely not only on the credit of the buyer but also on that of the issuing bank. By its terms, the credit often reflects a conscious negotiation of

⁴ The few cases to the contrary, see, e.g. *Twist Cap, Inc. v. Southeast Bank (In re Twist Cap, Inc.)*, 1 B.R. 284 (Bankr. D.Fla. 1979), have been "roundly criticized and otherwise ignored." *Blue Quail*, 138 B.R. at 589-90.

risk allocation between customer and beneficiary and its utility rests heavily on strict adherence to the agreed terms and the doctrine of independent contract. It is this predictability of credit arrangements which permits not only the financing of sale of goods transactions between widely separated parties in different jurisdictions but also has permitted the development of a market in trade or bankers' acceptances of time drafts."

First Commercial Bank v. Gotham Originals, Inc., 64 N.Y.2d 287, 297-98, 486 N.Y.S.2d 715, 721 (1985) (citation omitted); see also, e.g., *Exxon Co. v. Banque de Paris et des Pays-Bas*, 828 F.2d 1121, 1124 (5th Cir. 1987) ("Letters of credit facilitate commercial transactions, particularly in international commerce, by assuring certainty in application, consistency in interpretation across jurisdictional boundaries, and swiftness in execution."), *vacated on other grounds*, 488 U.S. 920 (1988); *Sound of Market Street, Inc. v. Continental Bank Int'l*, 819 F.2d 384, 388 (3d Cir. 1987) ("Letters of credit serve international commerce by providing assurance of prompt payment at minimal cost.").

In addition to these "commercial" letters of credit, so-called "standby" letters of credit function as an efficient method of allocating the risks of non-performance of a wide variety of commercial and financial contractual obligations, including corporate and municipal bonds. See John F. Dolan, *THE LAW OF LETTERS OF CREDIT* ¶ 1.06 at 1-22 (2d ed. 1991) ("There are virtually no limits to the variety of transactions that the standby credit can serve."). Standby letters of credit provide security for the discharge of contractual obligations by placing in the promisee's hands a swift means of obtaining compensation for any defects in performance.

B. Interference With Letters of Credit By Bankruptcy Courts Would Threaten Their Viability.

Numerous courts have long recognized that the "essence of a letter of credit is the promise by a bank, or other issuer, to pay money," and that the "key to the uniqueness of a letter of credit and to its commercial vitality is that the promise by the issuer is independent of any underlying contracts." *Pringle-Associated Mortgage Corp. v. Southern Nat. Bank*, 571 F.2d 871, 874 (5th Cir. 1978); *see also Itek Corp. v. First Nat. Bank of Boston*, 730 F.2d 19, 24 (1st Cir. 1984) ("The very object of a letter of credit is to provide a near foolproof method of placing money in its beneficiary's hands. . . ."); *Rockwell Int'l Sys., Inc. v. Citibank, N.A.*, 719 F.2d 583, 587 (2d Cir. 1983); *United Technologies Corp. v. Citibank, N.A.*, 469 F. Supp. 473, 477 (S.D.N.Y. 1979) (bank's obligation on letter of credit is independent of its customer's obligation in underlying transaction). As the Second Circuit observed in *Rockwell*:

"The letters of credit represent separate contractual undertakings that are, in legal contemplation, wholly distinct from whatever performance they ultimately secure. This is not merely an analytical nicety; the 'independence' principle is an example of legal form following commercial function, and it is recognized in domestic as well as international law."

719 F.2d at 587.

Courts thus have uniformly upheld the "independence principle," holding that, as a matter of law, the obligations of an issuing bank are totally independent of the underlying transaction. *See, e.g., Itek Corp.*, 730 F.2d at 24; *KMW Int'l v. Chase Manhattan Bank, N.A.*, 606 F.2d 10, 15-16

(2d Cir. 1979) ("As a matter of law, a bank's obligation under a letter of credit is totally independent of the underlying transaction."); *Pringle-Associated Mortgage Corp.*, 571 F.2d at 874 ("the uniqueness of a letter of credit . . . is that the promise by the issuer is independent of any underlying contracts"); *Chase Manhattan Bank v. Equibank*, 550 F.2d 882, 886 (3d Cir. 1977) ("[t]he beneficiary bases his claim on the letter of credit . . . not on the agreement between the customer and the issuing banks, nor upon the underlying arrangement between customer and beneficiary").

The independence principle allows parties to commercial transactions to rely on the "automaticity and brevity" of payment of a letter of credit in their decisions as to the risks and, thus, the price of transactions. Becker, *Standby Letters of Credit and the Iranian Cases: Will the Independence of the Credit Survive?*, 13 U.C.C.L.J. 335, 339 (1981) (discussing development of letters of credit and impact of threats to independence principle). *See also, e.g., American Bell Int'l, Inc. v. Islamic Republic of Iran*, 474 F. Supp. 420, 426 (S.D.N.Y. 1979) (bank would suffer loss of credibility from failure to pay letter of credit). Essential to that reliance is the parties' understanding that there will be minimal, if any, judicial interference with the issuing bank's payment on receipt of a demand in conformity with the terms of the credit. Without that assurance, the beneficiary has no certainty of payment, and the account party is unlikely to obtain what it needs at an acceptable price, if at all.

As the Supreme Court of Connecticut stated,

"[O]ne of the expected advantages and essential purposes of a letter of credit is that the beneficiary will be able to rely on assured, prompt payment from a solvent party; necessarily, a part of this expectation of ready payment is that there will be a

minimum of litigation and judicial interference, and this is one of the reasons for the value of the letter of credit device in financial transactions."

New York Life Ins. Co. v. Hartford Nat. Bank & Trust Co., 378 A.2d 562, 566 (1977); *see also Frey & Son, Inc. v. E.R. Sherburne Co.*, 193 A.D. 849, 854, 184 N.Y.S. 661, 664 (1920) (it "would be a calamity to the business world" if injunctions against payment of letters of credit were regularly granted).

For these reasons, reversal of the decision of the Fifth Circuit could seriously impair the viability of letters of credit, and thus destabilize the vast number of transactions that depend on them: "Let there be no doubt. If they set about to do it, courts exercising bankruptcy jurisdiction can doom the credit as a commercial product and can doom it with the infrequent case. The mere threat of an injunction is sufficient to destroy the effectiveness of the credit." *THE LAW OF LETTERS OF CREDIT*, *supra*, ¶ 7.03[3][d] at S7-10 (supp. 1994).

Conclusion

By recognizing the independence of the obligation to make payments under a supersedeas bond or letter of credit from any rights or obligations of a debtor in possession in bankruptcy, the Court below reaffirmed a principle essential to vast numbers of commercial and financial transactions. For this reason, and the reasons stated herein, The New

York Clearing House Association urges that this Court affirm the judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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